Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Hecla Mining Company,

Petitioner,

v.

Washington Wilderness Coalition, Okanogan Highlands Alliance, and Atlantic States Legal Foundation, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's rule improperly limit a district court's discretion in determining whether it is appropriate to award attorney's fees to a prevailing defendant in a citizen suit brought under the Federal Water Pollution Control Act ("Clean Water Act") and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All of the parties to the appeal in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

Pursuant to Sup. Ct. R. 29.6, petitioner has no parent company. Following are petitioner's non wholly owned subsidiaries:

ConSil Corp.

Minera ConSil S.A. de C.V. (wholly-owned subsidiary of ConSil Corp.)

Moonlight Mining Company

Nine Corporation

The Rosebud Mining Company, L.L.C.

Silver Mountain Lead Mines, Inc.

Wall Street Mining Company

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hecla Mining Company ("Hecla") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

OPINIONS BELOW

The Court of Appeals' panel decision (App. A), dated August 4, 1998, is unreported. The District Court's order dismissing all claims against Hecla (App. B), dated May 6, 1997, is unreported. The District Court's order denying Hecla's motion for attorney fees (App. C), dated July 9, 1997 is unreported.

JURISDICTION

The Court of Appeals' panel decision of which review is sought was rendered in an opinion filed on August 6, 1998 (App. A). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Water Act citizen suit provision, 33 U.S.C. §1365(d), provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party,

> whenever the court determines such award is appropriate.

The CERCLA citizen suit provision, 42 U.S.C. § 9659(f), provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

STATEMENT OF THE CASE

The number of citizen suits brought under the Federal environmental laws has sharply increased over the past several years.[1/] Across the country, professional litigators have discovered the citizen suit provisions contained in these statutes, and are dedicating their practices to environmental litigation. This explosion in environmental litigation has been driven in no small part by the provisions contained in most environmental

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1/ Between 1978 and 1983, potential plaintiffs nationwide filed a total of 41 notices of intent to sue under the Clean Water Act citizen suit provision; in 1983 and 1984, a total of 195 notices of intent were filed; between 1984 and 1987, 800 notices of intent were filed. Stephen G. Allen, Environmental Bounty Hunters: Reallocating Enforcement Authority Between Citizens and the Government Under the Clean Water Act, 5 Journal of Min. L. & Policy 257 (1989-90). This "explosion" of citizen suits has continued through the 1990s. Ross Macfarlane & Lori Terry, Citizen Suits: Impacts on Permitting and Agency Enforcement, 11-SPG Nat. Resources & Env't. 20, 20 (Spring 1997).

citizen suit statutes that allow a prevailing party to recover its costs and attorney fees.[2/] While much attention has been paid to the standards under which a prevailing plaintiff may recover its attorney fees under these provisions, the lower courts have been unable to reach a consensus as to what standards should govern an award of attorney fees to a prevailing defendant.

Here, the Ninth Circuit panel ruled, without any analysis, that the district courts may not award attorney fees to a party who has successfully defended a Clean Water Act or CERCLA citizen suit unless the defendant shows that the plaintiff's claims were "frivolous, unreasonable, or without foundation." App. A, at 3a-4a (citing standard created in Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995)). That decision is wholly at odds with the clear statutory language contained in these statutes, is not premised on any supportable legal analysis, and is a clear example of judicial legislating that should be corrected by this Court. The Ninth Circuit standard arbitrarily restricts the significant discretion that Congress expressly vested in the district courts

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2/ Beginning in the 1970s, Congress began inserting into nearly every new federal environmental statute a provision authorizing citizens to sue to enforce the statute in the event the agency entrusted with enforcement of the statute failed to enforce it adequately. Many of these statutes include fee-shifting provisions which, like the Clean Water Act and CERCLA provisions at issue in this case, allow either the "prevailing party" or "any party" to recover its fees in "appropriate" circumstances. See, e.g., Clean Air Act, 42 U.S.C. § 7604 (any party); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 (prevailing party); Noise Control Act, 42 U.S.C. § 4911 (any party); Endangered Species Act, 16 U.S.C. § 1540(g) (any party); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (any party); Solid Waste Disposal Act, 42 U.S.C. § 6972 (prevailing party); Clean Water Act, 33 U.S.C. § 1365 (prevailing party); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (prevailing party).

to determine when a fee award to a prevailing party is "appropriate." Courts in other circuits have struggled in this muddied area of the law and have inconsistently applied various standards that disfavor fee awards to defendants or, in contrast, apply a more even-handed approach to awarding fees to the prevailing party.[3/]

Over the past years, citizen suits — originally envisioned as a limited means of protecting the public interest by enforcing federal environmental laws only when the responsible agencies failed to do so[4/] — have evolved into an aggressive litigation tool used by a variety of plaintiffs to achieve a variety of goals — some of which are entirely unrelated to environmental protection or the public interest.[5/] Consequently, as the number of citizen suits has escalated, the equities involved in the suits have not followed a bright line, and the lower courts have struggled in trying to define the appropriate standards for fee awards. The Ninth Circuit has decided to apply a "frivolous, unreasonable, or without foundation" standard to substantially restrict a prevailing defendant's ability to recover fees, regardless of the equities at issue in a particular case. See

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3/ See infra Section III.

4/ See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987); Walter B. Russell, III & Paul Thomas Gregory, Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard, 18 Ga. L. Rev. 307, 308-09 (1984).

5/ One reason for this proliferation of suits is an entire cottage industry of lawyers specializing in locating potential citizen suit plaintiffs and prosecuting their suits. See Ross Macfarlane & Lori Terry, supra note 1, at 21. This development has reduced the public interest justification for many citizen suits.

Razore, 66 F.3d at 240. Unfortunately, this standard is legally unfounded and arbitrary.

This case presents the opportunity to correct the Ninth Circuit's improper restriction of the district courts' discretion to award attorney fees to prevailing defendants in Clean Water Act and CERCLA citizen suits, and to clarify this important area of the law. Since many of the federal environmental statutes contain similar fee-recovery language, this Court's review of the Ninth Circuit's decision would also provide much needed guidance to the lower courts in assessing attorney fee requests in the ever-increasing numbers of citizen suits brought under these laws.[6/]

A. The Facts Material To This Court's Consideration of the Question Presented

In 1981, Hecla Mining Company ('Hecla") acquired a mine near Republic, Washington that had produced gold and silver since the turn of the century (the "Republic Unit"). App. B, at 4. Over the years, ore tailings and wastewater from the mine were disposed in surface impoundments, or "tailings ponds," located on the mine property. App. B, at 8a-9a. The State of Washington has been delegated authority to implement the permitting provisions of the Clean Water Act, including Section 402 of the Clean Water Act, which authorizes the issuance of National Pollutant Discharge Elimination System ("NPDES") permits for discharges of pollutants to navigable waters. 33 U.S.C. § 1342. The previous owner of the Republic Unit had maintained waste discharge permits, issued by the State of Washington which authorized the discharge of a certain amount of wastewater from the only active tailing pond, known

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[6/] See supra note 1.

as the Aspen Pond, to surface and groundwater.[7/] App. B, at 10a.

In 1994, Hecla obtained a new permit from the Washington State Department of Ecology ("DOE"). This was a "zero discharge" permit, which provided that Hecla could not discharge any wastewater from the Aspen Pond. App. B, at 11a. To achieve this zero discharge standard, the permit established a schedule for decommissioning Aspen Pond and for building a replacement tailings pond that would employ modern technology designed to eliminate seepage. App. B, at 11a-12a. Seep collection wells were installed to collect seepage and pump it back to the pond. The DOE knew that a certain amount of wastewater was seeping from the Aspen Pond, as it had in the past issued permits expressly authorizing that discharge. App. B, at 11a. The DOE also understood that it would take time to eliminate all seepage from the historic tailings pond. App. B, at 11a-13a. Consequently, as long as Hecla complied with the closure schedule, DOE would deem it to be in compliance with the "zero discharge" requirement of the new permit. App. B, at 13a. While Hecla's permit contained the strictest discharge limitation possible — zero discharge— this new permit was not labeled an NPDES permit because, as a matter of policy, the DOE does not issue NPDES permits for discharges to groundwater, and the seepage from Aspen Pond was not discharging directly to surface waters. App. B, at 11a.

7/ The Aspen Pond was constructed in the 1950's. One early permit, issued in 1971, authorized discharge either to groundwater or directly into Eureka Creek, which passes through the Republic Unit; however, a later permit authorized discharge only to groundwater.

B. Proceedings Below

In 1994 three environmental groups filed suit against Hecla seeking penalties and injunctive relief for alleged violations of the Clean Water Act and CERCLA. The groups claimed that Hecla was violating the Clean Water Act because the company was discharging water from the Aspen Pond, and two other historic tailings areas on the Republic Unit property without an NPDES permit. App. B, at 2a. The groups premised their CERCLA claim on the theory that Hecla had failed to report to the National Response Center the release of a reportable quantity of a hazardous substance. App. B, at 2a. On the eve of trial, the environmental groups voluntarily dismissed their CERCLA claim, and also their prayer for injunctive relief. App. B, at 2a.

During the trial, the plaintiffs attempted to show that seepage from tailings ponds on Hecla's Republic Unit constituted a discharge into navigable waters, and that therefore, the DOE should have issued a permit to Hecla labeled an NPDES permit, rather than a wastewater discharge permit. After trial to an advisory jury, the district court dismissed the plaintiffs' remaining Clean Water Act claim for lack of standing. App. B, at 35a. The court held that the plaintiffs had not proved injury to any interest, either environmental, recreational, or health-based. For example, the court stated:

> This was not Silent Spring. There was no evidence that any living being even sustained inconvenience, let alone injury. There were no bloated fish floating belly-up, no featherless birds, no smells, no defoliation, no loss of habitat and no loss of aesthetics.

App. B, at 18a-19a. The court found that there was no evidence that "there should have been or even might have been" harm to fish and wildlife. App. B, at 19a. With respect to human health risks, again, neither the court nor the jury found evidence of harm. As the court stated: "The jury did not see Hecla's discharges as harmful. As one member of the jury put it, 'you could still drink the water out of Mud Lake or Eureka Creek and not perish from it.' " App. B, at 20a.

The district court found that the environmental groups' case was premised on a purely technical violation of the Clean Water Act. App. B, at 21a. The court further found that, even if the environmental groups had prevailed, the environment would not have benefitted because the plaintiffs had dropped their claim for injunctive relief, and the DOE had already required Hecla to close its facility and meet a strict compliance schedule for satisfying the "zero discharge" standard under its permit. App. C, at 38a-39a. As the district court stated, "The point of this suit was not to close Aspen Pond and save the environment. DOE had already done that." App. C, at 39a.

After the district court's dismissal of plaintiffs' Clean Water Act claim, Hecla moved for costs and fees. The court awarded Hecla costs as the prevailing party under Federal Rule of Civil Procedure 54(d)(1). App. C, at 48a, 51a. However, rather than exercising its discretion to determine whether the award of attorney fees to Hecla would be "appropriate" in this case, as directed by the Clean Water Act and CERCLA citizen suit provisions, the district court denied Hecla's motion for attorney fees outright based on untenable Ninth Circuit precedent. App. C, at 40a-41a, 45a-46a. The district court held that it was bound by the Ninth Circuit's decision in Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995), which prohibits district courts from awarding attorney fees to a prevailing defendant in a Clean Water Act citizen suit, unless

the defendant shows the plaintiff's action was "frivolous, unreasonable, or without foundation." App. C, at 40a-41a (citing Razore, 66 F3d at 240). The district court further surmised, "it is probable the Ninth Circuit would apply the same analysis [to the CERCLA citizen suit provision] as it did in Razore." App. C, at 45a-46a. Without any analysis, the Ninth Circuit affirmed the district court's ruling, citing its decision in Razore as controlling. App. A, at 3a-4a.

REASONS FOR GRANTING THE WRIT

The plain language of the Clean Water Act and CERCLA citizen suit provisions clearly provide for recovery of attorney fees by any prevailing party, whenever the district court deems it "appropriate." 33 U.S.C. § 1365(d); 42 U.S.C. § 9659(f). There exists no sound legal justification for substantially limiting the district court's discretion to determine when it is "appropriate" for a prevailing defendant to recover its attorney fees as the Ninth Circuit has done. The Ninth Circuit's automatic prohibition on the award of attorney fees to prevailing defendants absent a showing that the plaintiff's claims are "frivolous, unreasonable, or without foundation" is untenable, and should be rejected by this Court in favor of an approach that allows the federal district courts to evaluate all of the circumstances of a case before it.

I. THE NINTH CIRCUIT'S ATTEMPT TO RESTRICT THE DISTRICT COURT'S DISCRETION TO AWARD ATTORNEY FEES TO PREVAILING DEFENDANTS IN CLEAN WATER ACT AND CERCLA CITIZEN SUITS CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTES AND FINDS NO SUPPORT IN LEGISLATIVE HISTORY.

A. The Clear Language of the Statutes Dictates that District Courts Have Discretion in Awarding Attorney Fees to Prevailing Defendants.

It has long been established by this Court that in interpreting a statute, the plain language of the statute controls. If the language of a statute is clear and unambiguous, "that is the end of the matter": the Court should look no further than that language in determining a statute's meaning. Sullivan v. Stroop, 496 U.S. 478, 482 (1990); United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989). This is true unless the plain meaning of the statute would lead to "absurd or futile results," United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940), or unless there is a "clearly expressed legislative intention contrary to that language." INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987). This "plain meaning" rule is based on the truism that in the vast majority of its legislation Congress does mean what it says and thus the statutory language is normally the best evidence of congressional intent. United States v. Lanier, 117 S.Ct. 1219, 1226 (1997).

The fee-shifting provisions of the Clean Water Act and CERCLA unambiguously state that "the court . . . may award

costs of litigation (including reasonable attorney and expert witness fees)" to a "prevailing or substantially prevailing party" whenever the court determines that such an award is "appropriate." 33 U.S.C. §1365(d); 42 U.S.C. §9659(f). Nowhere do these provisions suggest that prevailing plaintiffs are automatically to be treated differently from prevailing defendants. Rather, the statutes adopt a single discretionary standard which applies to the "prevailing party," regardless of whether that party is a plaintiff or defendant. Congress did not impose any rigid limitations on a district court's discretion to award costs. Litigation costs "may" be awarded "whenever" the court determines that such an award is appropriate. Id. (emphasis added). By using these terms, Congress unequivocally granted the district courts discretion to award litigation costs to either party whenever they decide such an award is appropriate, based on the particular facts of the case before it. Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994) (the use of the term "may" in a statute "clearly connotes discretion").

Indeed, it is difficult to imagine how Congress could have been more explicit in granting broad discretionary authority to the district courts. Other statutes show that Congress knows how to impose limitations upon judicial discretion to award fees to a prevailing defendant when it so chooses. In fact, in the Pipeline Safety Act of 1992, Congress included essentially the same standard the Ninth Circuit is impermissibly trying to "legislate" here. The Act reads: "The court may award costs, reasonable expert witness fees, and a reasonable attorney's fee to a prevailing plaintiff in a civil action under this section. The court may award costs to a prevailing defendant when the action is unreasonable, frivolous, or meritless." 49 U.S.C. § 60121. See also 15 U.S.C. § 15(c) (similar dual standard in restraint of trade statute); 15 U.S.C. § 1692(k) (similar dual standard in debt collection statute). Thus,

it is clear that, when Congress intends to establish rigid dual standards for attorney fee recovery, it can expressly do so.

Congress has clearly indicated when it intended to subject prevailing defendants to a more onerous standard in seeking cost awards in cases brought to enforce several other federal statutes. For example, Section 552b(i) of the Administrative Procedure Act, 5 U.S.C. § 552(b), expressly provides that litigation costs may be assessed in favor of the substantially prevailing party, "except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes." 5 U.S.C. § 552b(i). Compare 42 U.S.C. § 11113 (in suit brought relating to professional review activities, defendant who "substantially prevailed" entitled to attorney fees if the claim was "frivolous, unreasonable, without foundation, or in bad faith"). See also the Latham Act, 15 U.S.C. § 1117(a), and the Patent Act, 35 U.S.C. § 285 (both stating that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party"). The obvious corollary is: when Congress intends to vest the trial court with discretion to determine when a fee award is appropriate to either party, it can do so. It has done so in the citizen suit authorization contained in the Clean Water Act.

In interpreting statutory language, a court's task is to "apply the text, not to improve upon it." Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 126 (1989). Because the fee-shifting provisions of the Clean Water Act and CERCLA unambiguously grant the district court broad discretion to award litigation costs to a prevailing party "whenever the court determines that such an award is appropriate," it is wrong for the Ninth Circuit to adopt its own rule narrowly limiting that discretion to significantly restrict the

circumstances under which a prevailing defendant may recover its fees.

B. The Legislative History of the Clean Water Act and CERCLA Supports an Interpretation that is Consistent with the Plain Language of the Statutes.

As discussed above, the plain language of the fee-shifting provisions in the Clean Water Act and CERCLA should govern unless that language leads to absurd or impracticable consequences, or there is a clearly expressed legislative intent to the contrary. Certainly allowing the district courts discretion to make fact-specific determinations as to whether to award litigation costs in a particular case does not implicate the "absurd or impracticable consequences" exception to the plain language rule. Moreover, there is no "clearly expressed legislative intention" to justify deviating from the statutory language. Rather, the legislative history of the Clean Water Act and CERCLA fully supports the vesting of discretion in the district courts to determine when a fee award to a prevailing defendant is "appropriate" given the facts and equities of a particular case.

For example, just six days before the 1972 Clean Water Act Amendments were passed, the fee-shifting provision of the Clean Water Act was discussed in the Joint Explanatory Statement of the Committee of Conference ("Joint Explanatory Statement"), authored by members of both the House and Senate. The Joint Explanatory Statement provides only that "[l]itigation costs may be awarded to any party if a court determines that such an award is appropriate." Conference Report No. 92-1236 (September 28, 1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3776, 3823. See also H.R. Rep. No. 92-911 (March 11, 1972), reprinted in 1 Legislative

History of the Water Pollution Control Act Amendments of 1972. See also, H.R. Rep. No. 99-253(V), 99th Cong., 1st Sess. (1985) (Superfund Amendments and Reauthorization Act of 1986, amendment to CERCLA) (stating that the fee-shifting provision allows the district court to "award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate").

The decision to make attorney fee awards available to either party at the discretion of the district court was a measured and considered one. The Clean Water Act citizen suit provision originally mandated that all successful plaintiffs receive litigation costs; this language was excised by the Committee prior to passage of the Act and replaced with language allowing any prevailing party to recover fees. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong. & Amin. News 3668, 3757. In short, rigid rules governing the recovery of fees were rejected.

There is simply no indication in the legislative history that Congress intended to place limitations on the district court's discretion in determining whether an award of attorney fees is appropriate. Rather, the language suggests that a district court's determination of whether to award costs should be driven by broad public interest considerations. While defendants should be entitled to an award of litigation costs (including attorney fees and expert witness fees) in defending actions that were frivolous or harassing, such cases do not constitute the exclusive list of circumstances under which Congress determined that an award of costs may be appropriate. Rather, such cases are simply one obvious example of when a litigation cost award would be in the public interest. See, e.g., S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong. & Amin. News 3668, 3747. The

ultimate determination of when an award of attorney fees is "appropriate" was left to the sound discretion of the district courts.

II. THE NINTH CIRCUIT'S IMPORTATION OF A STANDARD EMPLOYED IN CIVIL RIGHTS CASES INTO THE REALM OF ENVIRONMENTAL CITIZEN SUITS IS INAPPROPRIATE BECAUSE OF CLEAR DIFFERENCES IN THE PURPOSES OF THE STATUTES AND IN THE EQUITIES OF CITIZEN SUITS BROUGHT PURSUANT TO THE STATUTES.

In Razore, which was relied on by the courts below, the Ninth Circuit adopted the restrictive standard that is applied in awarding attorneys fees to prevailing defendants under the Civil Rights Act. Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (1995) (adopting the "frivolous, unreasonable, or without foundation" standard applied in a Title VII case in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). The Ninth Circuit's importation of a civil rights standard into the realm of environmental citizen suits is inappropriate both because it violates the fundamental rules of statutory interpretation discussed above, and because the equities, policies, and public interest considerations involved in the two kinds of cases differ greatly. The goals of federal environmental and civil rights statutes differ, and the role of plaintiffs in enforcing the statutes differ. Indeed, the dual standard created by the Ninth Circuit in Razore directly contradicts the purposes of the Clean Water Act and CERCLA.

A. The Goals of Civil Rights and Environmental Statutes Differ.

The goals of the two types of statutes differ importantly. Civil rights statutes are intended to stamp out all discrimination against target groups. These statutes reflect a judgment that discrimination of any sort, under any circumstances, is fundamentally wrong and cannot be tolerated. There is no such thing as an amount or type of discriminatory treatment that is a necessary byproduct of a productive economy. Environmental statutes, by contrast, attempt to balance competing, valid needs. They are intended to control the amount of pollution that is a necessary byproduct of economic activity. These statutes set the maximum level of pollution that Congress, through the agencies, determines is acceptable, given society's industrial needs. See S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), reprinted in 1972 U.S. Code Cong & Admin. News 3668, 3713 (With respect to setting effluent limitations under the Clean Water Act, stating, "The Committee has included language in this section requiring that in the determination of effluent limitations based on water quality, consideration must be given, on a case-by-case basis, to a balancing of the economic and social costs against the social and economic benefits sought to be obtained"). Not only do most environmental statutes contemplate that some level of pollution is necessary to sustain our industrialized economy; they expressly authorize industry to contribute to this pollution. The amount a particular entity is legally authorized to pollute is set by government-issued permits consistent with the applicable statute and implementing regulations. In fact, the very provision of the Clean Water Act that was at issue here, Section 402, authorizes the issuance of NPDES permits for the discharge of prescribed levels of pollutants. 33 USC § 1342.

One implication of this discrepancy between the goals of civil rights and environmental statutes is that citizen suits play different roles with respect to enforcement of the two types of statutes. Cf. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (in civil rights cases, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'") (emphasis added) (citing Newman v. Piggie Park Enter., 390 U.S. 400, 401 (1968), an earlier civil rights case) with Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (the Clean Water Act citizen suit "is meant to supplement, not supplant, governmental action"). While in the civil rights context the goal is to maximize meritorious citizen suits in order to eradicate discrimination, in the environmental context Congress sought to strike a balance by carefully delineating the role of citizen suits. See Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (legislative history of Resource Conservation and Recovery Act ("RCRA") indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and "avoiding burdening the federal courts with excessive numbers of [citizen] suits"). The policies served by the Clean Water Act and CERCLA are "more complex, more measured" than simply maximizing the number of lawsuits brought under those acts. Cf. Fogerty v. Fantasy, Inc., 510 U.S. 517, 526 (1994). Rather, environmental citizen suits are encouraged only to the extent that they attack the type and degree of pollution that Congress has determined is unacceptable, given the need to balance economic activity with environmental protection, and only if they do not intrude on the government's primary responsibility to protect the environment through agency action.

As a result, in the environmental context, not all citizen suits that may otherwise be considered technically meritorious

serve the public interest.[8/] Only those citizen suits that enforce the balance that Congress struck in the Act truly serve the public interest, and the district courts should be allowed to evaluate whether a suit had any public interest component in determining whether to award attorney fees to a prevailing defendant.

For example, Congress has recognized that "citizen suits are proper only if the Federal, State and local agencies fail to exercise their enforcement responsibility." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (quoting S. Rep. No. 92-414, p. 64 (1971), reprinted at 2A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1993)). Recognizing that the public interest is not advanced by citizen intrusion into governmental enforcement of the environmental laws, Congress has prohibited citizen suits where a governmental agency is "diligently prosecuting" an action to address alleged violations. 33 U.S.C. § 1365(b) (prohibiting citizen suits under the Clean Water Act where EPA or the state "has commenced and is diligently prosecuting" an action to enforce an effluent limitation under the Clean Water Act); 42 U.S.C. § 9659(d) (prohibiting citizen suits where EPA "has commenced and is diligently prosecuting" an action under CERCLA or under the Solid Waste Disposal Act); see also Gwaltney, 484 U.S. at 376 (recognizing the "potentially intrusive" role of citizens groups where governmental enforcement is underway). Similarly, to ensure that the cleanup of contaminated sites will not be slowed or halted by litigation, Congress has barred citizen suits where a site is subject to an EPA-ordered removal or remedial action under CERCLA. 42 U.S.C. § 9613(h).

[8/] See Walter B. Russell, III & Paul Thomas Gregory, supra note 4, at 355-58.

Moreover, both the Clean Water Act and CERCLA require potential citizen-plaintiffs to give 60 days notice of their intent to sue to an alleged violator as well as to EPA and the state. 33 U.S.C. § 1365(b)(1)(a); 42 U.S.C. § 9659(d). This notice "both allows government agencies to take action and lets the alleged violator cure the violation, either of which would obviate the need for a citizen suit." Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995) (citing Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989)). The principle of prohibiting unnecessary citizen suits is also embodied in Section 505(a)(1) of the Clean Water Act, which forecloses citizen suits for "wholly past" violations. Gwaltney, 484 U.S. at 63-64; 33 U.S.C. § 1365(a)(1).

As these provisions demonstrate, Congress was not simply concerned with maximizing the number of citizen suits brought under the Clean Water Act and CERCLA. Rather, Congress sought to encourage only those citizen suits designed to benefit the environment while discouraging lawsuits which will have little to no beneficial effect on the environment. Suits brought merely on principle, those which seek retribution for wholly past violations, and those in which the alleged violation is already being addressed through governmental enforcement were prohibited. This case, which was brought merely on principle for a purely paper violation of the Clean Water Act, where the State of Washington had already prescribed restrictive discharge prohibitions, and where plaintiffs lacked standing because there was absolutely no harm to the environment, is a prime example of an action which, although not patently frivolous according to the district court, does nothing to further the goals of the Clean Water Act or CERCLA. As the district court found:

> This action turned awkward on the eve of trial. It became less of a public interest case after

> plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. . . The point of this suit was not to close the Aspen Pond and save the environment. DOE had already done that.

App. C, at 39a. In such a case, the district court should have been allowed to exercise its discretion in determining whether it was appropriate to award attorney fees to Hecla.

B. The Equities of Citizen Suits Brought Pursuant to the Statutes Differ.

In civil rights cases, the equities tend to be clear. An individual plaintiff brings suit against a corporate entity that the plaintiff alleges has discriminated against him. In these cases, relatively unsophisticated an underfunded plaintiffs can "ill afford to litigate their claims against defendants with more resources," Fogerty, 510 U.S. at 524. By contrast, modern day environmental litigation is often initiated by large, sophisticated organizations with significant resources and in-depth knowledge of the law. See Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989) ("While the initial charge in a Title VII proceeding is normally filed by an aggrieved individual . . . citizen suits under RCRA are like any other lawsuit, generally filed by trained lawyers who are presumed to be aware of statutory requirements."). While many environmental citizen suits are brought by non-profit environmental organizations, these are often, as in this case, well-funded professional organizations. As the district court recognized,

> Plaintiffs are public interest groups, but they are also professional litigants. A Westlaw party search reveals that Atlantic States Legal

> Foundation has been involved in at least 45 actions dating back to 1984. Litigants enjoy no special dispensation from the rules of Federal procedure just because they happen to be professional litigants.

App. C, at 50a.

In addition, more and more frequently in environmental citizen suits, the plaintiff is not an environmental group at all, but rather a for-profit corporate entity seeking to protect its own property or business position. In RCRA and CERCLA citizen suits, for example, the owner of contaminated real property may bring suit against the party that sold it the property or against an adjacent landowner whose operations it contends originated the contamination. See, e.g., Painewebber Income Props. Three Ltd. Partnership v. Mobil Oil Corp., 916 F. Supp. 1239, 1241 (M.D. Fla. 1996) (RCRA suit by landowner against neighboring landowner); Chartrand v. Chrysler Corp., 785 F. Supp. 666, 668 (E.D. Mich. 1992) (RCRA and RICO suit by purchaser of contaminated land against seller of land). Or one corporate entity may bring suit against a competitor under one of the environmental statutes, despite the fact that the plaintiff's motive is to protect its own revenue source, not the environment. See, e.g., Consolidated Edison Co. v. Realty Investments Assocs., 524 F. Supp. 150, 151 (S.D.N.Y. 1981) (Clean Air Act suit brought by electric utility against competing electric utility).

These realities of modern environmental litigation deviate dramatically from the circumstances that led this Court to adopt a strict standard for awarding attorneys fees to prevailing defendants under the civil rights statutes in Christiansburg Garment. See 434 U.S. 412, 421 (1978) (enunciating limited "frivolous, unreasonable, or without

foundation" standard for Title VII cases). In Christiansburg Garment, this Court acknowledged that the plaintiff in civil rights cases is an individual, rather than an organization, and that the individual plaintiff is seeking to enforce - singlehandedly - a Congressional policy of "the highest priority." Id. at 418 (citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)). Nowhere did this Court suggest that its civil rights-specific ruling should be extended to environmental cases. In fact, this Court has acknowledged distinctions between the two types of cases that militate against the blind application of blanket standards to both types. See Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1990). Specifically, given the differing positions that plaintiffs and defendants may have in citizen suits under the Clean Water Act and CERCLA, unlike cases brought under civil rights authorities there is no sound basis for an absolute rule disfavoring recovery of attorney fees by the defendants in these types of cases.

The Ninth Circuit completely ignored these differing equities when enunciating its blanket Razore standard. If, as the plain language of the Clean Water Act and CERCLA direct, the district courts were free to make case-specific determinations of whether an award of fees to a prevailing defendant is appropriate, they could take into account the varying roles of the parties in the litigation and the presence or absence of a genuine public interest component in the case. That approach would promote the goals of these statutes, and produce far more equitable outcomes in attorney fee awards in these cases.

III. THIS COURT SHOULD GRANT THIS PETITION TO ADDRESS THE PROBLEM OF THE LOWER COURTS APPLYING DISPARATE STANDARDS IN AWARDING ATTORNEY FEES TO DEFENDANTS IN ENVIRONMENTAL CITIZEN SUITS.

The issue presented in this case is arising with the increasing frequency of environmental citizen suits nationwide. Unfortunately, the lower courts are applying no uniform standard to the award of attorney fees to prevailing defendants in these suits. The Razore standard is so fully at variance with the plain language of the statute that the courts seem unsure of how to reconcile the two. The result is a multiplicity of ad hoc standards and a needlessly muddied area of the law. Under the circumstances, it is impossible for citizen suit plaintiffs or defendants to divine what standard will apply in a given case. Some courts, such as the Ninth Circuit, blindly apply the Razore "frivolous, unreasonable, or without foundation" standard. See, e.g., Consolidated Edison Co. v. Realty Investments Assocs., L.P., 524 F. Supp. 150, 152-53 (S.D.N.Y. 1981).

Other courts, consistent with the statutory language, apply a discretionary approach, not articulating any formal standard for ruling on a defendant's fee requests, but weighing the facts to determine whether a fee award is appropriate under the circumstances. See, e.g., Sierra Club v. Shell Oil Co., 817 F.2d 1169, 1175 (5th Cir. 1987) (noting, "the court is permitted to award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines such award is appropriate," and upholding district court's award of attorney fees in Clean Water Act case to the prevailing defendant); Pape v. Manistique Papers, Inc., 114 F.3d 1188 (6th Cir. 1997) (table) (in unpublished disposition of RCRA citizen suit, court of appeals approves district court's award of attorney

fees to successful defendant as "appropriate under the circumstances of this case"); Chartrand v. Chrysler Corp., 785 F. Supp. 666, 669 (E.D. Mich. 1992) (in suit brought under both RCRA citizen suit authorization and the Racketeer Influenced and Corrupt Organizations Act, articulating "appropriateness" standard but denying defendant's request for fees, saying, "this Court finds that . . . there has not been any discovery unique to the RCRA claim as opposed to the other legal theories posited by the plaintiffs"); Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp., Civ. A. No. 94-1807, 1994 WL 675297, at 3 (E.D. Pa. Nov. 21, 1994) (in RCRA citizen suit, denying defendant fees under "appropriateness" standard).

Other courts have employed other standards that place various restrictions on fee awards to defendants. See, e.g., Washington Trout v. Scab Rock Feeders, 823 F. Supp. 819, 821 (E.D. Wash. 1993) (in Clean Water Act citizen suit, employing combination of "meritless, groundless, or without foundation" standard and "unreasonably and vexatiously"/ "intent, recklessness, or bad faith" standards to deny defendant attorney fees); PaineWebber Income Props. Three Limited Partnership v. Mobil Oil Corp., 916 F. Supp. 1239, 1244 (M.D. Fla. 1996) (in Resource Conservation and Recovery Act ("RCRA") citizen suit, applying "intent, recklessness, or bad faith" standard and denying defendant fees); National Wildlife Fed. v. Consumers Power Co., 729 F. Supp. 62, 64 (W.D. Mich. 1989) (in Clean Water Act citizen suit, denying defendant fees under "frivolous, meritless, or vexatious" standard); Truck Components Inc. v. Beatrice Co., No. 94 C 3228, 1996 WL 462520, at *12 (N.D. Ill. July 15, 1996) (in citizen suit brought under RCRA and CERCLA, stating that courts should approach defendants' fee requests with "caution" and stating that the Christiansburg standard is "helpful" in determining whether a defendant should be awarded fees).

Given the disparity between the plain language of the "appropriateness" standard contained in the citizen suit provisions of the Clean Water Act, CERCLA, and other environmental statutes, and the Ninth Circuit's blanket "frivolous, harassing, or without foundation" rule, lower court confusion over what standard applies to attorney fee requests by prevailing defendants can only be expected to increase as environmental citizen suits continue to proliferate. This Court should review this case to clarify the appropriate standard for the award of attorney fees to prevailing defendants in this important and unsettled area of the law.

CONCLUSION

Because this petition raises important issues of federal law that the lower courts have been unable to resolve in a uniform manner, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 4, 1998

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON WILDERNESS COALITION, a Washington nonprofit corporation; OKANOGAN HIGHLANDS ALLIANCE, a Washington nonprofit corporation; ATLANTIC STATES LEGAL FOUNDATION, a New York nonprofit corporation,	NOS. 97-35565 & 97-35754
Plaintiffs-Appellants-Cross-Appellees,	D.C. NO. CV-94-00233-FVS
v.	MEMORANDUM*
HECLA MINING COMPANY, a Delaware corporation,	
Defendant-Appellee-Cross-Appellant.	

*/This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Submitted August 4, 1998**
Seattle, Washington

Before: D.W. NELSON, KOZINSKI, and NOONAN, Circuit Judges.

The appellant organizations brought suit against Hecla Mining Company ("Hecla") alleging violations of federal environmental statutes. After a trial before an advisory jury, the district court granted Hecla's motion to dismiss the suit on the ground that the appellants lacked standing. The district court awarded Hecla a portion of its costs bill. The court declined, however, to grant Hecla's motion requesting attorney's fees. We affirm.

The appellant organizations lack standing to bring suit against Hecla. They failed to show that they have suffered any cognizable injury, as required by Lujan v. Defenders of Wildlife,

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**/ The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

504 U.S. 555, 560-61 (1992). The appellants presented only conjectural evidence of a health risk from their drinking water. See id. at 560. They were unable to prove that their interests in fishing or swimming in Mud Lake have been adversely affected by pollutants from Hecla's facility. Moreover, they presented no credible evidence that their aesthetic interests have been compromised. The district court consequently did not clearly err in finding that the appellants suffered no injury. See San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124 (9th Cir. 1996).

The appellants also are unable to identify any impropriety on Hecla's part that justifies imposing the punitive measure of denying its bill for costs. See National Info. Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1472 (9th Cir. 1995). The district court correctly observed that Hecla's motion had a considerably greater chance of success after trial than it would have had before trial. Hecla cannot now be penalized for employing what the court itself regarded as a successful litigation strategy.

Finally, with regard to Hecla's cross-appeal of the district court's decision not to award attorney's fees, we reject Hecla's challenge to the application of the standard articulated in Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995). Razore is the settled law of this circuit, and the appellants offer no compelling reason to revisit it.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

WASHINGTON WILDERNESS COALITION, a Washington Corporation, OKANOGAN HIGHLANDS ALLIANCE, a Washington corporation, and ATLANTIC STATES LEGAL FOUNDATION, INC.,	)	No. CS-94-233-FVS
Plaintiffs,	)	ORDER
vs.	)	
HECLA MINING COMPANY, a Delaware Corporation,	)	
Defendant.	)	

Trial to the bench concluded on April 1, 1997. Michael Axline, Richard A. Smith and Charles M. Tebbutt represented plaintiffs; defendant was represented by Mark Wielga, Scott W. Hardt and Jerry K. Boyd. This Order will memorialize the Court's findings and conclusions. FRCP 52(a).

A. Procedural Background

Plaintiffs are environmental organizations whose representative members are Susan Coleman and Michael Petersen. Defendant Hecla operates mines throughout the northwest and is headquartered in Coeur d'Alene, Idaho. Plaintiffs commenced this action on June 2, 1994 alleging two causes of action. The first claim was brought under Section 301 of the Clean Water Act [CWA], 33 U.S.C. § 1311, and alleges that Hecla is discharging pollutants into navigable waters without a National Pollutant Discharge Elimination System [NPDES] permit. The second claim was brought under the comprehensive Environmental Response Compensation & Liability Act (CERCLA), 42 U.S.C. § 9603(a), which requires a person in charge of a facility to report to the National Response Center any release of a hazardous substance in quantities equal to or greater than allowed by statute as soon as he has knowledge of such a release. Plaintiffs sought penalties and injunctive relief.

On October 21, 1994, the Court denied defendant's motion to dismiss. Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wn. 1994). On March 8, 1996, the Court denied plaintiffs' motion for summary judgment but significantly narrowed the issues. (**Ct. Rec. 80**). A renewed motion for partial summary judgment followed when plaintiffs discovered a culvert on Hecla's property discharging water which tested positive for pollutants. That motion was denied on January 10, 1997. (**Ct. Rec. 108**). Originally set for jury trial, defendant orally withdrew its jury demand during the hearing on the motion. On March 11, 1997, the Court ruled it would empanel an advisory jury pursuant to FRCP 39(c). On the eve of trial, plaintiffs abandoned the CERCLA claim. Also immediately prior to trial, plaintiffs abandoned their prayer for injunctive relief. The matter proceeded to trial on March 24, 1997 and concluded on April 1, 1997. The advisory jury returned a verdict in favor of plaintiffs in the amount of $295,000.

B. Transactional Background

Hecla's Republic Unit is located several miles north of Republic, Washington and produced gold and silver from the turn of the century forward. During the extraction process, crushed ore is treated with various chemicals including cyanide. Most of the cyanide is recovered, but minute quantities remain in solution when tailings are pumped in slurry form from the mill into a 38 acre impoundment known as Aspen Pond. In addition to ore tailings, Aspen Pond also received wastewater from the mine shafts. Additionally, it receives pumped-back water captured at two seepage collection points.

Aspen Pond is the focal point for geographical orientation. The facility is irregularly oval in shape and covers 38 acres. It is unlined except for the water containment qualities of the tailings themselves. It is undisputed the pond seeps, although the amount of seepage and the degree to which it is recovered and returned is in dispute. One seep ["Aspen Seep"] is located to the south of the pond. A collection system returns seepage

to Aspen Pond from this location. Another ["Unknown Seep"] lies to the east. There is no collection system at this location. Situated to the southeast is former Tailings Pond #1 which was constructed in the late 1930's. It received tailings between 1937 and 1941 when the embankment washed out during a flood. **Ex. M.** The contents flowed down the Eureka Creek drainage and some came to rest as far as six miles below the pond. **Exs. N & O.** With the exception of a portion of the lower embankment, the original boundaries of Tailings Pond #1 can no longer be ascertained. Former Tailings Pond #2 is located to the west of Aspen Pond. It was also constructed in the late 1930's and in use until the early 1960's when it was decommissioned and revegetated. A third seep ["Mud Lake Seep"] is located at its base where water is collected and returned to Aspen Pond.

Plaintiffs allege that all three ponds are sources of water pollution: (1) Aspen Pond because it is leaking into groundwater and from three seep points, one of which finds its

way into Eureka Creek; (2) Pond #1 because although no longer used in mining operations, tailings still remaining after the 1941 flood continue to leach contamination which finds its way into Eureka Creek; and (3) Pond #2 which is seeping into Mud Lake.

Hecla's predecessor-in-interest obtained a Washington State waste discharge permit on August 24, 1971, the year prior to enactment of the CWA. The permit allowed up to 230,000 gallons per day to be discharged to either groundwater or directly into Eureka Creek. **Ex. FF.** On November 1, 1976, a new permit issued which allowed for discharge of up to 274,000 gallons per day to groundwater, but not to surface waters. **Ex. GG.** Hecla acquired the property in 1981. In 1984, Hecla learned the unlined Aspen Pond was responsible for significant discharge into groundwater. **Ex. 8, pages 6-7.** An apparent "smoking gun" was created when a Hecla employee drafted a memo to his supervisor noting the seepage and advising that it might not be wise to confirm this with outside help. The memo

goes on to state "There may even be some merit in not spreading information too widely lest it fall in the wrong hands" **Ex. 7.** This appears to misstate the nature of Hecla's permit. It is apparent that DOE was always under the belief that Aspen Pond would leak and seep. Otherwise, there would have been no point to the terms of the permit allowing discharge of up to 274,000 gallons per day (190 gallons per minute) into groundwater. In any event, wiser heads prevailed and Hecla did not conceal this information as evidenced by the fact that Exhibit 7 was available at trial. Instead, Hecla went forward with hydrological studies performed by outside consultants.

A new permit issued on February 22, 1994. **Ex. HH.** It is not a NPDES permit. The Washington State Department of Ecology [DOE] to which the Environmental Protection Agency has delegated operational authority, will not issue a NPDES permit for discharge to ground water. Rather, it is a zero discharge permit. Nothing is supposed to escape from Aspen Pond, although as a practical matter, DOE was aware when

issuing the permit that seepage had been occurring for years from this unlined pond and would continue to occur so long as tailings were added. **Ex. 5, page 6.** Moreover, it is a closure permit which established a schedule for decommissioning Aspen Pond and building a replacement fourth pond which would employ modern technology designed to eliminate seepage. Effective November 30, 1994, Aspen Pond would be closed.

Litigation followed when Hecla appealed the terms of the permit to the Pollution Control Hearings Board [PCHB]. Kettle Range Conservation Group, an environmental organization, cross-appealed. On May 24, 1994, PCHB denied Hecla's motion for a stay. **Ex. 6.** Prior to the hearing on the merits, Hecla agreed to dismiss its appeal and DOE issued a new permit on December 29, 1994. **Ex. II.** The stipulation for settlement between Hecla and DOE recites that the terms of this permit "are protective of human health and the environment." This was the permit in effect at the time of trial.

DOE knew that overnight compliance was impossible. Hecla was given until July 1, 1995 in which to cease adding tailings to Aspen Pond and until November 30, 1996 to cease discharging mine drainage into the pond. **Ex. II, page 4.** The permit did not provide for a firm closure date, but did require Hecla to submit a closure plan by the end of 1995 and required the company to provide evidence of economic responsibility for the costs of closure within 90 days after DOE approval of the plan. Id. at page 8.

According to the DOE official who issued the permit, Water Quality Section Manager Carl Nuechterlein, Hecla would be "deemed to be in compliance" with the zero discharge requirement so long as it was in actual compliance with the closure schedule. As long as the schedule was maintained, DOE would not take enforcement action. When a permit holder exceeds effluent limitations, it is DOE's common practice to bring the polluter into compliance over a period of time. DOE takes the position that Hecla has all permits required by law.

Certainly it has all the permits available given DOE's policy of not issuing a NPDES permit for discharge to groundwater. According to Mr. Nuechterlein, Hecla has been in substantial compliance with the monitoring and reporting requirements of the permit. Hecla is also in compliance with the closure schedule.

Hecla also has a stormwater permit which covers surface water runoff associated with rainfall or snow melt. This was issued both under NPDES authority and under the State's waste discharge authority. The permit covers the entire Hecla facility except for "stormwater associated with the tailings pond" which, given the date of issuance in 1994, would necessarily mean Aspen Pond because it was the only pond in operation at the time.

C. Issues

> To establish a violation of the CWA's NPDES requirements, plaintiffs must demonstrate that defendants (1) discharged or "added" (2) a pollutant (3) to navigable waters (4) from a point source (5) without a permit.

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168, 1172 (D Mont. 1995).

(1) Aspen Pond: Pretrial, the Court held that Aspen Pond was a point source as a matter of law. **(Ct. Rec. 80, page 5).** The Court also held that both Eureka Creek and Mud Lake were navigable waters as a matter of law. See Washington Wilderness Coalition, supra, 870 F. Supp. at 989. The Court also held that Aspen Pond was not covered by a current NPDES permit, a matter not in dispute. **(Ct. Rec. 80, page 2).** Nor was Aspen Pond covered by Hecla's stormwater permit. **(Ct. Rec. 108, page 5).** That left very little for trial; i.e., whether Hecla was adding pollutants to either Eureka Creek or Mud Lake through this point source.

(2) Tailings Pond #1: Pretrial, the Court declined to find Tailings Pond #1 to be a point source because the embankment washed out in 1941 and "there is substantial disagreement as to whether it remains a discrete facility." **(Ct. Rec. 80, page 6).** After hearing the evidence, the Court held that the culvert

jutting out of what had previously been the embankment was a point source. The culvert was part of a stormwater collection system designed to channel rain water and snow melt from the area of Tailings Pond #1. **Ex. GG.** Remaining for the finder of fact was whether Hecla was adding pollutants to Eureka Creek through the culvert and if so whether such discharge was covered by the stormwater permit.

(3) Tailings Pond #2: The Court also held that Tailings Pond #2 was a point source as a matter of law. (**Ct. Rec. 80, page 6**). The questions remaining for trial were whether this facility was discharging pollutants into Mud Lake and if so, whether such discharges were covered by the stormwater permit.

D. The Advisory Jury Verdict

The jury was a diverse group, the members of which had no difficulty digesting the evidence and independently forming concrete opinions. At the same time, they were able to achieve consensus. Ordinarily, it would be inappropriate to inquire into

deliberations. People of the Territory of Guam v. Marquez, 963 F.2d 1311, 1315 (9th Cir. 1992). Because the whole purpose of empaneling an advisory jury is to secure advice, it seemed logical to obtain the benefit of the jury's thought processes as well as its bottom line conclusions. Accordingly, an informal but on-the-record discussion with the jury was held post-verdict. Two features were striking.

First, the jury did not accept counsels' presentation of the case in which both sides argued that Aspen Pond, Tailings Pond #1 and Tailings Pond #2 either were or were not discrete point sources. The jury was not instructed on what a point source was, although they heard it defined as the evidence came in. Jurors gave meaning to both words in this term of art and focused on "source" as much as they did on "point." According to the jury, Tailings Pond #2 was not a point source of pollutants despite the fact that pollutants were obviously flowing into Upper Mud Lake at the Mud Lake Seep located at the base of Pond #2. The source, rather, was Aspen Pond

which manifested itself in at least three seeps, two of which were flowing into surface waters. **TR 11-12, 16-17, 21-22.** As to Tailings Pond #1, the jury believed that leaching occurring between the headwaters of the creek and its entry into the culvert might have played some role, but the real culprit was Unknown Seep which ran directly into Eureka Creek, and the source of the seep was Aspen Pond. **TR 3-4, 7-9, 12-13.**

Second, the jury wished to punish and deter Hecla. **TR 28, 30-31.** Hecla knew at least as early as 1984 that seepage was out of control. **Ex. 8, pages 6-7.** One of the company's perceived failings was to disregard the advice of its consultants. **TR 26-27.** The result was not nearly as punishing as it could have been. The penalty assessed for Unknown Seep was $1 per day, or rounded up slightly, $3,000 for the relevant time frame which is substantially less than the $25,000-27,500 per day which could have been assessed. The penalty assessed for Mud Lake Seep was $100 per day, or $292,000 for the relevant time frame. The significance of the jurors' motivation is that they

were not particularly impressed by environmental injury. They would have been had there been environmental injury, but there was none.

This was not Silent Spring. There was no evidence that any living being even sustained inconvenience, let alone injury. There were no bloated fish floating belly-up, no featherless birds, no smells, no defoliation, no loss of habitat and no loss of aesthetics. At worst in the last regard, there was some discharge of iron water characterized by a rusty hue. There was no percipient testimony of any harm to fish or wildlife. Nor was there any expert testimony that there should have been or even might have been such harm. The closest anyone came to espousing this position was when defense aquatic biology and ecology expert John Houghton testified that several samples revealed cyanide levels in excess of Washington State's extremely low ceiling of 5.2 ppb for aquatic life which is below the detection limits employed by the laboratories used by both parties in this case. That was not particularly telling because

neither Mud Lake nor Eureka Creek provide habitat for fish. Mud Lake freezes over in winter and photosynthesis ceases when the ice becomes snow covered. It is probable that in severe winters, the lake freezes solid. These features, coupled with the decaying vegetation covering the bottom of the lake render it anaerobic during the winter. Dr. Houghton was reasonably certain the lake did not currently contain any fish. Eureka Creek does not provide habitat because of physical barriers which prevent upstream migration, the dearth of pooling areas, steep gradient, and the fact that the upper reaches of the creek go dry in mid-summer.

The jury did not see Hecla's discharges as harmful. As one member of the jury put it, "you could still drink the water out of Mud Lake or Eureka Creek and not perish from it. **TR 29.** As another put it, "So as far as the safety of the water and the contaminants in the water, to my mind there was no question that it really wasn't making it hazardous in any way, and there is no concern that in the future there is going to be these terrible

hazards and frogs with four legs and that kind of thing."*** TR 38.

It must be assumed that the jury accepted the testimony of defense ecology experts and particularly that of Hecla's environmental toxology expert, Joyce Tsuji. She testified that EPA drinking water standards assume a constant rate of consumption from a single source over the span of a lifetime. The highest cyanide reading ever obtained in Eureka Creek was 230 times lower than is found in cherry juice which means that drinking 14.5 gallons of Eureka Creek water is equivalent to drinking one cup of cherry juice. Drinking four and one-half gallons of Mud Lake water would yield as much sodium as one can of Campbell's chicken noodle soup. The sodium levels in the area were below that of commercially sold low sodium mineral water. Dr. Tsuji believed the contamination levels were not a threat to human health.

***/Since all normally constituted frogs have four legs, the speaker no doubt meant to say six, eight or any number other than four. The point still comes across.

The jury found technical violations, and being unimpressed with Hecla's responsiveness, imposed a technical penalty of approximately one-fifth of one percent of what could have been imposed. The jury approached the lack of injury with such certainty that it tends to flavor the answer to a question the jury was not asked to answer. If no injury is shown to the flora and fauna of the area, or to those who view and/or interact with the flora and fauna, how can plaintiffs' representatives show injury to themselves?

E. Standing

"Article III limits the jurisdiction of federal courts to 'cases' and 'controversies.'. . . Standing is an essential, core component of the case or controversy requirement." San Diego County Gun Rights v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996). "An organization can establish standing either by demonstrating that its members suffered injury in fact for which the organization can sue in its representational capacity, or by demonstrating that the organization itself has suffered injury in fact." Heart of

America Northwest v. Westinghouse Hanford Co., 820 F. Supp. 1265, 1270 (E.D. Wn. 1993). Plaintiffs here sue in their representational capacity. "An organization may bring an action on behalf of its members if (1) the individual members would otherwise have standing to sue in their own right; (2) the interests being protected are relevant to the organization's purpose; and (3) the individual members are not required to participate in the law suit." Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1396 (9th Cir. 1992). Thus, the issue is whether plaintiffs' members have suffered injury in fact, and more narrowly, whether the representatives who testified at trial have shown injury in fact.

Injury is not a statutory element of a CWA violation. A technical violation of the Act may occur even in the absence of any demonstrable injury. Lack of injury may be a mitigating factor (33 U.S.C. § 1319(d)), but the statute does not require its presence. However, injury is a judge-imposed requirement for any lawsuit because of Article III's case or controversy

requirement. San Diego County Gun Rights Committee, supra, 98 F.3d at 1126.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations and footnote omitted).

Someone attempting to represent the public interest will generally also have to establish he is representing his own interest as well. As noted by Lujan, "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way." Id. at 560 n.1, 112 S. Ct. at 2136 n.1. The

burden of proof is on the party asserting jurisdiction. Id. at 561, 112 S. Ct. at 2136.

According to plaintiffs, "These injuries need not be large, an 'identifiable trifle' will suffice." Public Int. Research of N.J. v. Powell Duffryn, 913 F.2d 64, 71 (3rd Cir. 1990), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018 (1991), citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S. Ct. 2405 (1973). Quoting a treatise, SCRAP observed that "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." 412 U.S. at 689 n.14, 93 S. Ct. at 2417 n.14.

One might think it difficult to reconcile the concept of an "identifiable trifle" with a harm that is "concrete and particularized, and actual or imminent, not conjectural or hypothetical" as required by Lujan, supra, 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks omitted). Some courts

have questioned whether SCRAP is consistent with more recent Supreme Court sentiment. "Not only has the Supreme Court itself declared it an outlier, see Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S. Ct. 3177, 3189, 111 L. Ed.2d 695 (1990), but SCRAP was heard on its pleadings, at which point a reviewing court 'presumes that general allegations embrace those specific facts that are necessary to support the claim.' " Florida Audubon Soc. v. Bentsen, 94 F. 3d 658, 672 (D.C. Cir. 1996) (en banc) ; see also, Tanford v. Brand, 883 F. Supp. 1231, 1236 (S.D. Ind. 1995); Oceanport Industries, Inc. v. Wilmington Stevedores, Inc., 636 A.2d 892, 904 n.16 (Del. Supr. 1994) (SCRAP has been "narrowed to the point of invalidation"). An injury need not be "significant," perhaps, but it must be real.

Plaintiffs' representatives assert four bases of injury: (1) loss of use of Mud Lake for swimming and fishing; (2) loss of fishing in the Sanpoil River; (3) generalized concern over

danger to wildlife habitat; and (4) contamination of drinking water in Republic.

(1) Mud Lake: Mr. Petersen lives ten miles north of Republic. He has never used Eureka Creek or Mud Lake for any purpose. He stated he might like to use Mud Lake for swimming but for its reputation as polluted. Ms. Coleman uses Mud Lake for recreational purposes. After peddling her bicycle up the steep hill near the mine site, she enjoys resting at the lake and watching the birds. "And watch the birds and such. So it's a nice, nice little place that a number of people, you know, you see people there all the time sort of enjoying the site."

Ms. Coleman would use Mud Lake for both swimming and fishing but for the perception that the lake is polluted. She was not aware whether there were any fish in Mud Lake. She relayed a hearsay statement that some years ago, local residents ran an aerator to keep the lake open during the winter. That would tend to suggest that the fishing was sufficiently good in times past to justify the practice. But it would also suggest that

now that the practice of keeping the lake open has been abandoned, so have the fish. Ms. Coleman was not aware of any studies about fish in Mud Lake. Neither witness proposed any use for Eureka Creek. Neither was aware of any decline in bird population. Thus, what it comes down to is Mud Lake' s availability for swimming and fishing, assuming the lake has any fish.

These witnesses learned after this litigation was commenced that Mud Lake is on private property belonging to Hecla and could not be used for swimming or fishing without trespassing. Hecla's William Suhr testified he was never asked for permission to use Mud Lake, but would have denied it if asked. Both Ms. Coleman and Mr. Petersen testified they would not trespass. If they were not prepared to trespass, then at most they had an inchoate desire to use the lake if and when Hecla would give them permission to do so. This is slim. One cannot claim injury for being precluded from using another's private property unless some basis exists for a claim of right.

Plaintiffs rely on Orion Corp. v. State, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022, 108 S. Ct. 1996 (1988) for the proposition that because navigable waters are subject to the public trust, Hecla could not refuse members of the public access to Mud Lake. Orion in turn relied on Wilbour v. Gallagher, 77 Wn.2d 306, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878, 91 S. Ct. 119 (1970). The holding of Wilbour has little to do with the facts of this case. Wilbour merely stands for the principle that when riparian lands are subject to fluctuations in contiguous lake levels, the public may "follow the water" when the rising levels flood the riparian land. 77 Wn.2d at 314-16.

The public trust doctrine retains validity in Washington. See generally, Orion, supra, 109 Wn.2d at 638-42. "The public trust doctrine resembles 'a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'" Id. In the abstract, plaintiffs have an arguable point. Orion holds the door open in dicta for

imposing an access servitude on any lands in which the public may have an interest. In practice, however, research has failed to disclose any reported Washington case which has employed the public trust doctrine to burden a lake front property owner by opening his land to all members of the public who wish to use it.

On the contrary, attempts to apply Wilbour more broadly have not met with success. Harris v. Hylebos Industries, Inc., 81 Wn.2d 770, 784-87, 505 P.2d 457 (1973). The general rule remains that a riparian owner may enjoy exclusive possession of his land and exclude others. Veach v. Culp, 21 Wn. App. 454, 458, 585 P.2d 818 (1978), rev'd on other grounds, 92 Wn. 2d 570, 599 P.2d 526 (1979). The fact that one might have a right to use water does not afford permission to traverse the lands of another to exercise that right. Id. Illustrative is Kemp v. Putnam, 47 Wn.2d 530, 288 P.2d 837 (1955), overruled on other grounds, Save a Valuable Environment (SAVE) v. City of Bothell, 89 Wn.2d 862, 867, 576 P.2d 401 (1978). Holding

that the two streams under consideration were navigable and thus belonged to the State, and that the public could freely use the streams without regard for private ownership rights and subject only to the State's regulation, the court observed as follows:

> The fact that members of the public are entitled to fish the navigable streams in question, of course, does not give them the right to trespass upon the appellant's land in reaching those streams, and the respondent Kemp has not questioned that part of the trial court's order which restrained him from so doing.

Id. at 537.

Assuming that Mud Lake is navigable under Washington law (which it is for CWA purposes under federal law),[****] members of the public might fish or swim in it if they can figure out a way to do so without trespassing on Hecla's lands, but as a practical matter, that is not likely to occur.

[****]/Cf., Kemp, supra, 47 Wn.2d at 533 (Washington test for navigability).

(2) Fishing the Sanpoil: Ms. Coleman fishes in the Sanpoil River some thirty miles below Republic. The river is fed by Granite Creek which in turn is fed by Eureka Creek. She relayed a hearsay statement that the fisheries are in decline. This is too remote to satisfy standing requirements. Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361-62 (5th Cir. 1996). "Water runs downhill" is a truism. Id. At the same time, it is a trite truism. The record is silent as to how diluted Eureka Creek becomes upon entering Granite Creek and how diluted Granite Creek becomes upon entering the Sanpoil River. Since Eureka Creek water has itself not been shown to be hazardous; i.e., "you could still drink the water. . . and not perish from it," it would take a substantial leap of faith to conclude that events transpiring thirty miles away are fairly traceable to Hecla's discharges.

(3) Generalized concern: Mr. Petersen expressed a generalized concern for the future of plants and wildlife. This is precisely the sort of interest no longer cognizable after Lujan.

(4) Republic water: Mr. Petersen spends some time in Republic on business and when there drinks the water. Ms. Coleman works in Republic and drinks the water on a daily basis. Both are concerned that the city wells may become affected as time p[illegible]ses. The evidence reflected no scientific hydrological link between the Republic wells located near the confluence of Granite Creek and the Sanpoil River other than the fact that water flows downhill. The only evidence of a hydrological nexus was to the contrary; i.e., that ground faults prevent Eureka Creek water from migrating to the well site. **Ex. RR.**[*****] Moreover, testing of the Republic wells has shown that with a single exception, city water meets water

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[*****]/This evidence is weak. No expert testified to this at trial. Exhibit RR is a letter from a Hecla unit manager dated November 4, 1994 urging that DOE need not be concerned about the Republic wells because of the lack of a hydrological connection with the Hecla facility. The author does not disclose the basis of his knowledge. DOE apparently did not accept this position because the December 1994 permit continued to require monitoring of the Republic wells. Mr. Nuechterlein disclaimed any knowledge of the technical aspects of the exhibit, but testified that DOE wanted more data before eliminating the monitoring requirement. TR 932. Weak or not, Exhibit RR is the only evidence in the case touching upon the issue.

quality standards. **Exs. RR, SS.** The single exception is that in 1993, one well reflected an excess of iron. **Ex. SS.** This phenomenon did not recur when the well was retested in 1994. **Ex. RR.** This is mineral rich country, and nothing in the evidence ties an excess of iron to Hecla's discrete facility. Moreover, Dr. Tsuji explained that the excessive iron indicated a "secondary maximum contaminant level" meaning that "it's not based on health, it's based on taste or color or staining or other such properties."

A concern over the safety of the public water supply is not an idle concern. This is what prompted DOE to take the closure action and to require Hecla to monitor the Republic wells as a condition of issuing the 1994 permit. In today's society, it is no longer a tolerable approach to adopt a wait-and-see attitude in such matters. By the time a hydrological link is proven by the presence of pollutants in the public water supply, the damage has been done.

However, saying that DOE may have had grounds to be concerned over the future of Republic's water supply and to require investigative testing to confirm or refute the possibility of harm is not the same as saying that every resident of the Republic area would be able to show actual or imminent injury. The fact that DOE placed Hecla under a closure order in February 1994 with tailings barred from the pond by November of that year, and imposed strict monitoring requirements and contaminant level ceilings in the interim, would strongly suggest that in June 1994 when this suit was commenced, future harm was most unlikely.[******] Not only was the closure order in place, but PCHB had already denied Hecla's application for a stay on May 24, 1994. As a practical matter, denial of the stay went a long way toward resolving the merits because the merits could not have been reached very far in advance of the November

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[******]/The December 1994 permit which issued after the stipulation for dismissal of the appeal was reached extended the deadline from November 1994 to July 1995. For jurisdictional purposes, the relevant facts are those existing when the complaint was filed. Didrickson v. U.S. Dept. of Interior, 982 F.2d 1332, 1339 (9th Cir. 1992).

1994 closure date. This issue fails both the injury and traceability prongs of Lujan.

Because plaintiffs, through their representative members, have demonstrated no particularized injury affecting them in a personal and individual way as required by Lujan, supra they have not carried their burden of establishing standing. With respect to the Republic wells and the Sanpoil River, even assuming injury were shown in some theoretical sense, plaintiffs have not demonstrated traceability.

IT IS HEREBY ORDERED:

This action is DISMISSED for lack of standing.

IT IS SO ORDERED. The District Executive is hereby directed to enter this Order, enter judgment thereon, furnish copies to counsel and close this file.

DATED this 8th day of May 1997.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. CS 94-233-FVS

WASHINGTON WILDERNESS COALITION, a Washington Corporation, OKANOGAN HIGHLANDS ALLIANCE, a Washington corporation, and ATLANTIC STATES LEGAL FOUNDATION, INC.,	)	NO. CS 94-233-FVS
Plaintiffs,	)	ORDER
vs.	)	
HECLA MINING COMPANY, a Delaware Corporation,	)	
Defendant.	)	

BEFORE THE COURT are defendant's Motion for Fees and Costs and plaintiffs' Motions to Stay and to Retax Costs. Michael Axline, Richard A. Smith and Charles M. Tebbutt represent plaintiffs; defendant is represented by Mark Wielga.

Scott W. Hardt and Jerry K. Boyd. This Order will memorialize the Court's rulings.

Background

After trial to the bench with an advisory jury, the Court entered findings and conclusions on May 7, 1997 and held that plaintiffs' representatives failed to demonstrate particularized injury and plaintiffs thus lacked derivative standing. Plaintiffs made no effort to establish organizational standing. Accordingly, the action was dismissed for lack of jurisdiction. Defendant's motion for fees and costs followed as did plaintiffs' motion to retax costs. Plaintiffs also seek a stay pending appeal.

This action turned awkward on the eve of trial. It became less of a public interest case after plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. Hecla was effectively out of business the day PCHB denied its request for a stay. That occurred prior to suit being filed. Although DOE relaxed its grip in December 1994 by allowing Hecla additional

time in which to operate and effect closure, that was not the situation in June 1994 when suit was commenced. At that time, Aspen Pond was scheduled to close in five months and would be closely monitored in the interim with new restrictions on contaminant levels. The point of this suit was not to close Aspen Pond and save the environment. DOE had already done that.

One would have to stop short of saying, as does Hecla, that the action was never a public interest case at all. Public benefit extrinsic to the case actually being litigated may accrue when actual or potential polluters realize that if they do not watch their ways, they may be facing similar litigation in the future. Deterrence is a legitimate function of a CWA action, and for reasons to be addressed, Hecla may be in need of deterrence.

Analysis

(A) Motion to stay: Judicial economy would best be served by reaching these matters while the facts are fresh in mind.

(B) Motion for fees.

(1) CWA claim: A prevailing defendant may seek fees and costs under the CWA.

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d).

To be entitled, a successful plaintiff need only prevail on a significant point in contention. "All that is necessary is that '(1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action, and (2) there was a legal basis for the plaintiffs' claim.' " Idaho Conservation League, Inc. v. Russell, 946 F.2d 717, 719 (9th Cir. 1991) (citation omitted). The standard under which a prevailing defendant may obtain fees and costs is more onerous. Razore v. Tulalip Tribes of Washington, 66 F.3d 236, 240 (9th Cir. 1995). Razore borrowed the standard set out in Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 700

(1978), a Title VII case. A prevailing defendant will be entitled to fees only if "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 66 F.3d at 240.

The existence of Unknown Seep was uncontroverted. Plaintiffs' expert John Monks observed it flowing into Eureka Creek. **TR 63.** Defense expert Douglas Frick agreed with this observation, although he disagreed that the source was Aspen Pond. **TR 640.** It was Aspen Pond. Given the constituency of chemicals flowing from the seep,******* there is no other explanation. Plaintiffs proved a CWA violation. Unknown Seep was an unpermitted point source discharging pollutants to navigable waters of the United States. That is all which is required. Beartooth Alliance v. Crown Butte Mines, 904 F.

*******/The advisory jury focused on cyanide as a signature chemical because while other contaminants may occur naturally in this mineral rich area, cyanide can be attributed only to mining operations. Cyanide occurs in nature; e.g., apricot pits, but no one pointed to an apricot orchard at the Republic Unit. The water-runs-downhill axiom has its limitations, but Aspen Pond is the only conceivable source of the cyanide.

Supp. 1168, 1172 (D. Mopt. 1995). Where plaintiffs failed was in not establishing standing. Congress does not take CWA violations lightly as evidenced by the stout statutory per-day penalties. When a party makes out a factual case and fails only in its jurisdictional case, it is difficult to characterize the claim as frivolous or unreasonable or without foundation.

Hecla points to authority holding that a prevailing defendant may be awarded fees under the Christianburg standard even if the claim is dismissed on jurisdictional grounds. Elks Nat. Foundation v. Weber, 942 F.2d 1480, 1485 (9th Cir. 1991), cert. denied, 505 U.S. 1206, 112 S. Ct. 2995 (1992). Weber is distinguishable. In Weber, plaintiffs were litigants in state court proceedings involving rights in an oil lease. Dissatisfied with the decision of the state supreme court, they filed a § 1983 action in federal court naming the members of the court and seeking declaratory and injunctive relief. Id. at 1483. What they should have done, of course, is petition the United States Supreme Court for certiorari because that is the only

court with authority to review decisions of the States' highest courts. Id. There is no such thing as "horizontal review" except, perhaps, in the habeas context. This principle was settled when the federal action was filed. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486, 103 S. Ct. 1303, 1317 (1983). This was a major mistake of law which rendered the action frivolous. A reasonable attorney would not sue the members of a state supreme court for doing no more than "erroneously" construing the state's domestic contract law. When the trial court dismissed the action, it awarded fees alternatively under 42 U.S.C. § 1988 and FRCP 11. 942 F.2d at 1483. The first basis is compensatory, but the latter is punitive.

Here, the mistake was one of fact. Pursuant to FRCP 11(b), plaintiffs certified that "to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances:"

> Defendant's violation of the CWA and CERCLA have adversely impacted the plaintiffs' ability to use and enjoy these areas and have injured plaintiffs' health, recreational, environmental, and aesthetic interests.

Complaint at ¶ 11.

These representations were not borne out at trial. There was no testimony that aesthetic values were harmed. There was evidence that health interests were a concern. Certainly they were. That is what prompted DOE's action in laying that concern to rest by closing Aspen Pond. But there was no evidence that plaintiffs' representatives personally suffered injury to their health or faced any scientifically sustainable risk that they would. There was evidence plaintiffs' representatives had "environmental" concerns. Everyone does, but this is not the sort of particularized harm the case law requires. Finally, there was testimony that recreational interests were harmed. To exercise that interest, however, would require plaintiffs' representatives to become trespassers.

It is true that standing is an integral component of every action brought in the federal system. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992). This might be a different case if Hecla had brought and prevailed on a pretrial motion challenging standing, but defendant apparently believed trial was required to reach the issue. In the end, plaintiffs' proof fell short, but that is not the same as saying the outcome was so manifestly preordained as to cause the action to be frivolous, unreasonable or without foundation.

(2) CERCLA: Fees and costs are also available under CERCLA.

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

42 U.S.C. § 9659(f).

The parties do not cite, and independent research has not revealed, any decision in which a prevailing defendant has been awarded fees under this section. However, § 9659(f) is word-for-word identical to § 1365(d). Given this same wording, and the parallel goals of CWA and CERCLA, it is probable the Ninth Circuit would apply the same analysis it did in Razore. See ASLF v. Onondaga Dept. of Drainage and Sanitation, 899 F. Supp. 84, 87 (N.D. N.Y. 1995).

Plaintiffs' case rested largely on the premise that dissociated sodium ions which were at one time a constituent of sodium cyanide are subject to the same reporting requirements as the parent compound. This view was not without support. In re Tri-State Mint, Inc., 1994 WL 157571 (E.P.A. 1994). In denying plaintiffs' motion for summary judgment, the Court did not reach the legal question, reserving it until the evidence was in. It would be for the finder of fact to determine whether the chemical at issue was harmless basic sodium and hence not reportable or a dissociated form of a reportable substance. If

the latter, it would then be for the Court to decide whether to adopt Tri-State Mint. Tri-State Mint is weak when applied here, both because of the decision's a priori reasoning and the observation that unlike the fact pattern in Tri-State Mint, it is probably not scientifically possible under the facts of this case to say where the sodium ions originated. Nonetheless, it was authority.

In an analogous vein, the Ninth Circuit has counseled against moving precipitously when a litigant has at least a toe hold on the law:

> NMEC also sought indemnification for Riverhead's RICO claims. Case law, here also, does not so clearly bar NMEC's claims as to warrant sanctions. While courts have held that there is no right to indemnification or contribution (partial equitable indemnification) under RICO. . . . neither the 9th Circuit nor the Supreme Court have disposed of the issue. With no higher court ruling, it certainly would not violate Rule 11 for NMEC to argue that such a right existed.

Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1117 n.2 (9th Cir. 1990) (citations omitted).

That is a broad statement, and possibly broader than the Riverhead panel intended. It cannot be that the Court was suggesting that a position which is manifestly frivolous, disclaimed by every hornbook writer and contrary to the established law of every other circuit becomes less frivolous merely because no litigant has ever before had the temerity to present the argument to the Ninth Circuit. Be that as it may, the above-quoted passage counsels against penalizing a litigant for exercising creativity. The evolution of the law would grind to a halt were that the result. Plaintiffs' CERCLA claim was weak when brought and weaker still after entry of the order on summary judgment, but it was not frivolous, unreasonable, or without foundation.

(C) Motion to retax costs: The Clerk denied almost 90% of Hecla's cost bill and awarded only $2,670 of the $21,404 requested. Plaintiffs seek total disallowance of costs on two grounds: (1) Hecla incurred the costs of trial unnecessarily because standing should have been challenged by pretrial

motion; and (2) plaintiffs are public interest groups who serve as private attorneys general and costs should not be assessed so long as an action is brought in good faith.

(1) Costs unnecessarily incurred: Hecla knew all it was going to know about its standing case upon deposing plaintiffs' representatives. The question is whether the defense could have effectively made a motion at that time. The motion could have been made, and it might have been successful, but success was not certain. The key to the representatives' asserted injury was whether there was injury to anything.

> If no injury is shown to the flora and fauna of the area, or to those who view and/or interact with the flora and fauna, how can plaintiffs' representatives show injury to themselves?

(Ct. Rec. 152, page 12).

Predictably, if faced with the motion, plaintiffs would have pointed to well contamination, loss of habitat, loss of fishing and loss of recreational opportunities. It would have been necessary to try the entire case on paper; something courts do

not do when credibility enters into the picture. Hecla may have had strategy in mind independent of the likelihood of success on the motion, but after hearing the case live, it seems improbable that a motion would have been as effective as was trial.

(2) Public interest: Plaintiffs are public interest groups, but they are also professional litigants. A Westlaw party search reveals that Atlantic States Legal Foundation has been involved in at least 45 actions dating back to 1984. Litigants enjoy no special dispensation from the rules of federal procedure just because they happen to be professional litigants. The rule in this Circuit is that costs are awarded as a matter of course and are denied only if the prevailing party has done something culpable which merits sanctions. National Information Services, Inc. v. TRW, Inc., 51 F.3d 1470, 1472-73 (9th Cir. 1995). Hecla did nothing worthy of punishment.

A court cannot deny properly claimed costs without stating a reason. Id. at 1472; accord, Zenith Ins. Co. v. Breslaw, 108 F.3d 205, 207 (9th Cir. 1997). No such reasons come to mind

and plaintiffs advance none relative to Hecla's culpability other than to assert that a pretrial motion on the standing issue should have been brought. This Circuit has rejected plaintiffs' contention that the losing party's good faith insulates it from paying costs. National Information, supra, 51 F.3d at 1472; accord, Zenith, supra, 108 F.3d at 207. The system expects good faith on the part of all litigants as a matter of course. National Information, supra, 51 F.3d at 1472. The inquiry is not what the losing party has done right, but what the prevailing party has done wrong.

IT IS HEREBY ORDERED:

(1) Plaintiffs' Motion to Stay (**Ct. Rec. 159**) is DENIED.

(2) Defendant's Motion for Fees and Costs (**Ct. Rec. 154**) is DENIED.

(3) Plaintiff's Motion to Retax Costs (**Ct. Rec. 172**) is DENIED.

IT IS SO ORDERED. The District Executive is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of July 1997.

Supreme Court, U.S.
FILED
FEB 4 1999
CLERK

No. 98-751

In The

Supreme Court of the United States

October Term, 1998

HECLA MINING COMPANY,

Petitioner,

v.

WASHINGTON WILDERNESS COALITION,
OKANOGAN HIGHLANDS ALLIANCE,
AND ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's application in this case of uniform Supreme Court and appellate court precedent on fee awards in public interest cases provide any reason to grant a writ of certiorari?

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, respondents state that they have no parent companies, subsidiaries, or affiliates.

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STATEMENT OF THE CASE

Petitioner Hecla Mining Company ("Hecla") maintains a thirty-eight acre impoundment, called Aspen Pond, at its facility just upstream from the city of Republic, Washington, to hold wastewater and tailings from its mining and milling operation. Petitioner's App. B, at 8a. The unlined impoundment, full of cyanide and heavy metals, is perched next to and above Eureka Creek, which runs down through the city of Republic. Aspen Pond discharges contaminated wastewater at several points. Petitioner's App. B, at 8a-9a. Hecla's own monitoring data show that toxic pollutants are escaping from Aspen Pond, and Hecla knew as early as 1984 that "seepage was out of control." Petitioner's App. B, at 18a. The collection systems that Hecla installed to capture this seepage are not effective, and contaminated wastewater flows via ground and surface water into the Eureka Creek watershed and down through the city of Republic. Petitioner's App. C, at 41a.

In 1994, the state of Washington issued a permit expressly prohibiting Hecla from discharging pollutants from Aspen Pond. Petitioner's App. B, at 11a.[1] Despite this prohibition on discharges from Aspen Pond, and according to Hecla's own data, Hecla discharges 31 million gallons of wastewater from Aspen Pond into the Eureka Creek watershed every year.[2] Cyanide, a highly

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[1] Respondents dispute Hecla's statement that Hecla's prior permits authorized it to discharge to ground and surface water (Petition at 6).

[2] Respondents dispute petitioner's statement that DOE knew and understood that illegal discharges were occurring.

toxic chemical traceable only to Hecla's facility, has been detected in the surface waters of Eureka Creek just outside city limits. Metals associated with mine waste have been detected in city wells at levels just below state standards, and the state of Washington has ordered Hecla to monitor city wells for contamination from the mine site.[3] Respondents' members work in Republic, live near the mine site, and recreate next to a pond that has been contaminated by Hecla's illegal discharges.[4]

Government regulatory efforts were not effective in controlling Hecla's illegal discharges. The Washington Department of Ecology's (DOE's) regional director testified at trial that the DOE has a single enforcement officer for all of Eastern Washington, and that the agency's budget has been steadily reduced during the last five years. Because Hecla's discharges are illegal and harm or threaten the health, recreational, and aesthetic interests of respondents' members, respondents brought this case alleging violations of the Federal Water Pollution Control

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Petition at 6. Nothing in the record supports this statement. At most, DOE knew some leakage was occurring, but assumed bypass-collection systems interrupted and returned those discharges to the pond.

[3] Respondents dispute Hecla's statement that "there was absolutely no harm to the environment." Petition at 19. Respondents demonstrated extensive environmental harm from cyanide and heavy metals.

[4] Respondents dispute Hecla's statement that respondents are "well-funded professional organizations." Petition at 20. There is absolutely no evidence to support this statement. It was not raised below, and it simply is not true.

Act ("Clean Water Act" or "CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 33 U.S.C. §§ 1251-1387; 42 U.S.C. §§ 9601-9675.

The district court informed the parties, several days before trial, that it intended to empanel an advisory jury pursuant to Federal Rule of Civil Procedure 39(c). At that point, respondents elected to simplify the case by pursuing only the CWA claim. After a seven-day trial, the jury found that Hecla had violated the CWA and recommended that the court impose $295,000 in penalties. Petitioner's App. B, at 7a, 18a. The court, however, granted Hecla's post-trial motion to dismiss for lack of standing. Petitioner's App. B, at 36a. Following the court's judgment, Hecla filed a motion for expert witness and attorneys fees, and argued that respondents' claims were frivolous and brought in bad faith. The district court rejected the motion. Petitioner's App. C, at 51a. The court found that respondents had "proved a Clean Water Act violation" and reasoned that "when a party makes out a factual case and fails only in its jurisdictional case, it is difficult to characterize the claim as unreasonable or without foundation." Petitioner's App. C, at 42a. The court also rejected Hecla's argument that respondents' CERCLA claim lacked foundation. Although respondents elected not to pursue the CERCLA claim at trial, the Court nevertheless considered the CERCLA issues presented to be meritorious. Petitioner's App. C, at 45a-48a.[5]

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[5] Respondents dispute Hecla's assertion that the case "was brought merely on principle for a purely paper violation." Petition at 19. Nothing in the record supports this statement and

In making its fee determination, the district court followed the Ninth Circuit's decision in *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236 (9th Cir. 1995), which in turn followed this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Acknowledging that it could not meet *Razore's* standard, Hecla asked the Ninth Circuit to overturn its decision in *Razore* on the same legal grounds that Hecla raises in its petition to this Court.[6] The Ninth Circuit declined to do so, and affirmed the district court's decision to deny Hecla's request for fees. Petitioner's App. A, at 4a.

ARGUMENT

The CWA and CERCLA authorize courts to award attorney fees "to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 33 U.S.C. § 1356(d); 42 U.S.C. § 9659(f). The Ninth Circuit, drawing directly from this Court's decision in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), awards fees to prevailing defendants only if the defendants establish that the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir.

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it is contradicted by the complaint and motions, which address serious and substantive violations of the CWA and CERCA.

[6] Respondents appealed the district court's standing decision, and the Ninth Circuit affirmed that decision in the same unpublished opinion denying Hecla's fee appeal. *See* Petitioner's App. A. Respondents elected not to cross-petition for certiorari.

1995) (citing *Christiansburg*). *See also Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (applying same standard under 42 U.S.C. § 1988). This standard is not unique to the Ninth Circuit. *See infra* Part II (listing cases). The standard, moreover, is consistent with the plain language and Congressional objectives of the CWA and CERCLA.

Hecla's petition, without citing any disagreement among the circuits of the federal court of appeals, or any conflict with previous opinions of this Court, asks this Court to consider adopting a new standard – one that would remove all limits on judicial discretion and allow courts to award fees against meritorious, but non-prevailing, citizen respondents. Such a standard would undermine the very reason that Congress authorized citizen suits in the Clean Water Act and CERCLA – to encourage citizen enforcement of those Acts.[7] For the reasons

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[7] Although Hecla refers ominously to an increase in the number of citizen enforcement actions filed since the CWA was adopted in 1972, Hecla fails to disclose what percentage have been resolved against plaintiffs. An increase in the number of meritorious citizen enforcement actions provides benefits Congress intended. *See* D. Hodas, *Enforcement of Environmental Law In a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?* 54 Md. L. Rev. 1552, 1574 (1995) ("only extensive use of citizen suits as private attorneys general can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool."). Congress has acknowledged: "Citizen suits are a proven enforcement tool. They operate as Congress intended – to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains." S. Rep. No. 99-50, at 28 (1985). More enforcement means more compliance with the CWA and

explained below, Hecla's petition for a writ of certiorari should be denied.

I. PETITIONER'S ASSERTION THAT THE CWA AND CERCLA GRANT UNCONTROLLED DISCRETION TO AWARD FEES AGAINST MERITORIOUS PLAINTIFFS IS INCORRECT

The plain language of the CWA and CERCLA establishes that Congress intended that courts take into account the goal of encouraging citizen enforcement when awarding fees. *See* 33 U.S.C. § 1365(d); 42 U.S.C. § 9659(f) ("The court . . . *may* award costs of litigation (including reasonable attorney and expert witness fees). . . . ") (emphasis added). Hecla argues, however, that because the statute provides discretion, judicial decisions cannot restrict that discretion by limiting fee awards to defendants to cases that are frivolous or unreasonable. Petition at 10-15. But courts routinely develop rules that bound the exercise of statutorily authorized discretion. *See Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("Although the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits."). In fact, that is what this Court did in *Christiansburg, supra*, with respect to Title VII. And in this case, Congress specifically included the phrase "whenever . . . appropriate" in the statutory language to guide the exercise of discretion in

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greater environmental protection. The fact that petitioners would prefer less enforcement of the CWA is not a reason for granting a writ of certiorari.

awarding fees.[8] Hecla's "plain meaning" analysis overlooks both this statutory guide to judicial discretion and this Court's historic role in guiding the exercise of discretion to award fees.

A. The Term "Whenever . . . Appropriate" Should Be Interpreted In Light Of The Purposes Of The Clean Water Act

Of course, the term "whenever . . . appropriate" does not fully explain when fees should be awarded. As this Court recognized in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983):

> [i]t is difficult to draw any meaningful guidance from . . . use of the word 'appropriate,' which means only 'specially suitable: fit, proper.' Obviously, in order to decide when fees should be awarded . . . a court first must decide what the award should be 'specially suitable,' 'fit,' or 'proper' *for*.

463 U.S. at 683 (internal citations omitted) (emphasis added).

In the context of statutes that cast citizen plaintiffs in the role of "private attorneys general," this Court has already determined, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), that it is "appropriate" to impose a more stringent standard on prevailing defendants who seek fees. Although the statutory language at

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[8] In fact, to remove limits on judicial discretion would promote inconsistent and *ad hoc* standards of the type that Hecla purportedly seeks to avoid. *See* Petition at 23-25.

issue in *Christiansburg* did not on its face distinguish between prevailing parties, such a rule furthers the purposes of the statute. This "dual" standard, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 520 (1994), is the one that the Ninth Circuit and the district court correctly applied in denying Hecla's request for fees in this case.

The rationale for treating prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees in citizen suits is clearly explained in *Christiansburg*. *Christiansburg* interpreted the fee provision in Title VII, which contains language authorizing courts to award fees to the "prevailing party."[9] Like Hecla in this case, the prevailing defendant in *Christiansburg* argued that the plain meaning of Title VII's fee provision did not allow courts to treat prevailing plaintiffs and prevailing defendants differently for the purpose of awarding fees. The Court rejected that argument outright: "[T]he permissive and discretionary language of the statute does not even invite, let alone require, such a mechanical construction." 434 U.S. at 418. Rather than treating the parties similarly, the *Christiansburg* court identified two equitable considerations that compelled a more lenient fee standard for prevailing civil rights plaintiffs, and a more difficult standard for prevailing defendants.

The first consideration is that the "plaintiff is the chosen instrument of Congress to vindicate 'a policy that

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[9] Section 706(k) provides, "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs[.]" 42 U.S.C. § 2000e-5(k). The fee provisions of the CWA and CERCLA are virtually identical.

Congress considered of the highest priority.' " 434 U.S. at 418 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)). The second consideration is that when a district court awards attorney fees to a prevailing plaintiff, it is awarding them against a violator of federal law. *Id.* To award fees against a good faith, but non-prevailing plaintiff, would discourage private enforcement and undermine the purpose of citizen enforcement provisions. *See* 434 U.S. at 422 (awarding fees to defendants "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII"). Based on these policy considerations, and backed by legislative history indicating that Congress intended to encourage citizen enforcement and deter frivolous suits, this Court held in *Christiansburg* that lower courts could award fees to a prevailing Title VII defendant only upon finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421.

This dual standard was reaffirmed in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). *Fogerty* involved a fee decision governed by § 505 of the Copyright Act, which contains fee-shifting language similar to the civil rights statutes. *See* 17 U.S.C. § 505. Unlike this case, the circuits at the time of *Fogerty* were divided over whether a prevailing defendant seeking fees under the Copyright Act should be required to establish that the plaintiff's infringement claim was frivolous or vexatious. 510 U.S. at 521 n.8. After reviewing the goals and policies of the Copyright Act, this Court declined to apply the dual standard, because the equitable considerations of the Copyright Act are not the same as the civil rights statutes.

Nor did this Court find Congressional intent in the Copyright Act to encourage plaintiffs to bring meritorious infringement claims. Rather, this Court concluded that the Copyright Act's goal of "stimulat[ing] artistic creativity for the general public good," is furthered by vigorous claims and defenses. *Fogerty*, 510 U.S. at 527 ("[D]efendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."). The Court, however, took the opportunity to reaffirm that the dual standard is appropriate under other statutes, including public interest statutes with fee-shifting language virtually identical to the fee-shifting language of the Copyright Act. *Id.* at 522-23.

Unlike the Copyright Act, both of the equitable considerations that persuaded the Court to adopt a dual standard in *Christiansburg* are present in CWA and CERCLA citizen enforcement actions. The citizen suit provisions in these laws, like the citizen suit provisions in the civil rights statutes, were enacted to encourage citizen participation in enforcing the important Congressional objective of preserving natural resources and preventing pollution. *See, e.g.*, S. Rep. No. 414, 92d Cong., 2d Sess. 64 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730 ("if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action."). In addition, when a court awards fees to a prevailing plaintiff in an environmental citizen suit, as noted in *Christiansburg*, *supra*, it is awarding fees against a violator of federal law.

Citizen suits provide a secondary benefit that should be included in the analysis of equitable considerations. They level the playing field and insure more uniform compliance, so that conscientious dischargers who comply with the provisions of CERCLA and the CWA are not at a competitive disadvantage with those who do not comply. Citizen enforcement "can provide the states, through dedicated and persistent litigation, with the level playing field that the federal government cannot provide on its own." D. Hodas, *Enforcement In a Triangular Federal System, supra,* 52 Md. L. Rev. at 1574-78.

The second equitable factor in *Christiansburg* also applies when interpreting the phrase "whenever . . . appropriate" in the CWA and CERCLA. When plaintiffs prevail, it means that the fees that are awarded will be paid by an entity that has been found to be in violation of the statute. As in *Christiansburg,* this factor supports treating prevailing plaintiffs differently than prevailing defendants. Unlike imposing fees on violators of the law, awarding fees against meritorious but non-prevailing plaintiffs would punish entities for having invested years of time and effort in performing a civic duty (enforcement of the law) with no expectation of monetary compensation.[10]

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[10] Hecla implies that the attorneys who represent citizens in these enforcement actions are mercenaries with pecuniary interests having nothing to do with enforcement of the statutes. Petition at 20-22. The mere fact that the attorneys are paid only if they prevail, however, does not suggest any impropriety. Hecla's attorneys, of course, are paid for advocating their clients interests whether they win or lose, and therefore have less incentive to advocate only meritorious arguments.

In this case, plaintiffs established that Hecla is discharging millions of gallons of toxic wastewater into the watershed above plaintiffs' community, in violation of a permit that prohibits such discharges. A jury found that Hecla was violating the CWA, and recommended that the court impose $295,000 in penalities. To order plaintiffs to pay defendant's attorney fees under such circumstances would not be "appropriate," and would certainly deter other citizens from bringing the sorts of enforcement actions that Congress so clearly intended.

B. The Evolution Of Statutory Language In Post-Clean Water Act Citizen Suit Provisions Confirms That Congress Approves Of The Dual Standard For Fees In Citizen Suits

Petitioners argue that because the Pipeline Safety Act of 1992, 49 U.S.C. § 60121(b), and several other recent statutes explicitly bifurcate the fee standard for prevailing plaintiffs and prevailing defendants, the absence of similar language in the CWA and CERCLA means by negative implication that Congress intended a single standard to be applied to both parties under the CWA and CERCLA. Petition at 11. The more explicit bifurcation in recent legislation, however, merely indicates congressional approval of the dual standard developed by courts in interpreting the "whenever . . . appropriate" language of the CWA and other public interest statutes. These enactments do not indicate that Congress meant something other than to encourage citizen enforcement under the CWA.

The citizen suit and fee-shifting provisions were added to the Pipeline Safety Act in 1976. Congress acknowledged that the purpose of the fee-shifting provisions was to "insure effective enforcement and compliance" with the Act. S. Rep. No. 852, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Adm. News 4673. In imposing a more stringent fee standard upon prevailing defendants, Congress specifically noted that this provision was consistent with *United States Steel v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974). *United States Steel* interpreted § 706(k) of the civil rights statutes. Although § 706(k), like the fee-shifting provisions of the CWA and CERCLA, does not expressly identify a fee standard for prevailing defendants, the *United States Steel* court applied a dual standard based upon the same reasoning later applied by this Court in *Christiansburg*, and declined to award fees to a prevailing defendant. By incorporating the judicially developed dual standard into the statutory language of the later Pipeline Safety Act, Congress accepted, rather than rejected, the dual standard approach to interpreting the "whenever . . . appropriate" language found both in civil rights statutes and in the CWA and CERCLA.

Congress has twice amended the CWA since the "whenever . . . appropriate" language was adopted in the citizen suit provision of the Act. *See* Act of December 27, 1977, Pub. L. No. 95-217; 91 Stat. 1566; Act of February 4, 1987, Pub. L. No. 100-4; 101 Stat 7. At the time of those amendments, courts were applying the dual standard to fee awards, and the only case to have addressed the dual standard in the specific context of a CWA citizen suit had held that the dual standard was appropriate in such case.

See, Consolidated Edison Co. v. Realty Investment Co., 524 F. Supp. 150, 153 (S.D. N.Y. 1981) (defendants may be awarded fees under CWA only if case was "objectively frivolous."). It is well established that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Had Congress disagreed with the judicial interpretations being applied to the "whenever . . . appropriate" language of the civil rights laws, the CWA, or CERCLA, it could have corrected that interpretation. Because it did not, the ratification principle suggests that Congress agrees with the dual standard developed by this Court, and its application to a broad range of public interest statutes with common fee-shifting language.

C. The Court Has Previously Recognized That It Is Appropriate To Apply Civil Rights Fee Jurisprudence To Fee Issues In Environmental Cases

Hecla argues that the *Christiansburg* standard cannot be "imported" from civil rights cases into environmental cases because "the equities, policies, and public interest considerations involved in the two kinds of cases differ greatly." Petition at 15. The differences cited by Hecla, however, are not differences at all, and support, rather than undermine, application of the *Christiansburg* dual standard to environmental cases.

This Court has previously recognized the similarities advanced by environmental and civil rights statutes and

the similarity in methods used to achieve those objectives: "Given the common purpose of both [Clean Air Act] § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 560 (1986); *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1982) (interpreting fee provisions of section 1988 and of the 1964 Civil Rights Act similarly).

The legislative history of the citizen suit provision of the Clean Air Act, on which the CWA and CERCLA provisions are based, establishes that Congress was influenced by the success of citizen enforcement of the Civil Rights Act and used the Civil Rights Act citizen suit provision as a model for the Clean Air Act citizen suit provision:

> Our experience in areas of massive unlawful racial discrimination . . . tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that rights cannot be violated with impunity. Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individual affected by, or concerned about pollution in his life, the power to stop them through the legal process.

Statement of Attorney General Ramsey Clark in support of citizen suit provision of Clean Air Act of 1970, *reprinted*

in Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 728 (D.C. Cir. 1975). This Court recognized as early as *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983), that "the interpretation of 'appropriate' in § 307(f) [of the Clean Air Act] controls construction of the term in [sixteen other environmental statutes, including the Clean Water Act]."

Hecla argues that environmental cases are different from civil rights cases because civil rights cases involve absolute bars on certain behaviors, while environmental cases involve standards developed after balancing competing environmental and economic interests. Petition at 16-17. This, however, is a distinction without a difference. Regardless of how a standard is developed or where it is set, violations of the standard are prohibited. In both civil rights and environmental cases, Congress sought to enlist the aid of citizens in enforcing that law and preventing violations. Hecla cites no authority for the proposition that Congress was less concerned with violations of environmental laws than it was with violations of civil rights laws, and Respondents are unaware of any such authority.

Petitioner's argument that citizen suits supplement EPA's enforcement authority, whereas civil rights laws are enforced directly by injured parties (Petition at 17), is also beside the point. Congress meant to encourage citizen enforcement in both cases, and the dual standard adopted in *Christiansburg* is necessary to achieve Congressional purposes in both cases.[11] Perhaps more

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[11] Petitioners point to the sixty-day notice requirement and "diligent prosecution" defenses of the CWA and CERCLA as

importantly, because plaintiffs in environmental citizen suits do not stand to gain financially from acting as private attorneys general, they will be unwilling to risk prosecuting even meritorious cases if faced with the risk of paying a defendant's fees when, as in this case, they succeed on the merits but lose on a procedural issue. The interpretation urged by Hecla would thus "render[ ] the [citizen suit] statute useless, in all or nearly all instances, to effect the very object it was originally enacted to accomplish." *Keene Corp. v. United States*, 508 U.S. 200, 213-14 (1993).

D. The Legislative History Of The CWA And CERCLA Support This Court's Dual Standard Approach

Hecla argues that because Congress rejected a provision that would have made fee awards mandatory under the CWA, and instead adopted a provision that made awards discretionary, Congress necessarily meant to leave courts complete discretion to award fees to either plaintiffs or defendants. Petition at 14 (citing S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971), *reprinted in* 1972

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evidence that "Congress sought to encourage only those citizen suits designed to benefit the environment while discouraging lawsuits which will have no beneficial effect on the environment." Petition at 19. Again, this observation does not indicate that Congress was less concerned with enforcement of environmental laws than civil rights laws. Assuming the sixty-day notice and diligent prosecution provisions are satisfied, the analysis is the same – did Congress intend to encourage citizen enforcement? The answer is yes in both environmental and civil rights cases.

U.S.C.C.A.N. 3668, 3747). Hecla's conclusion, however, is not compelled or even supported by the language on which Hecla relies. A decision to authorize, but not compel, courts to award fees hardly means that Congress intended courts to have unlimited discretion. The more direct legislative history of both the CWA and CERCLA shows that Congress intended to use fee awards to encourage citizen suits, and limit awards to defendants to cases in which suits were found to be frivolous or harassing – the very standard that has been consistently applied by courts, including this Court, in cases where Congress has authorized citizens to enforce public laws.

The first environmental statute to authorize citizens to sue and recover fees and costs when they prevail was the Clean Air Act of 1970 (CAA). The CAA provided that fees could be awarded to "any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). This provision has served as a model for other environmental citizen suit provisions that have come after it, including the CWA citizen suit provision. As this Court noted in *Ruckleshaus v. Sierra Club, supra,* 463 U.S. at 682, n.1, "the interpretation of 'appropriate' in § 307(f) controls construction of the term in [sixteen other environmental] statutes [including the CWA]." The Senate Report on the CAA explains the legislative understanding of when an award of fees to a defendant might be "appropriate":

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable

> attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award cost of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

S. Rep. No. 1196, 91st Cong., 2d Sess. 36-39 (1970) (quoted in *NRDC v. Train*, 510 F.2d 692, 725 (D.C. Cir. 1975)). As noted in *Train*, 510 F.2d at 728, Congress adopted the fee-shifting provisions of the CAA citizen suit in part due to the success of a similar provision in the Civil Rights Act in forcing compliance with the Act.

The next environmental law adopted by Congress with a fee-shifting citizen suit provision was the Federal Water Pollution Control Act Amendments of 1972 (later renamed the Clean Water Act). The fee-shifting language of the CWA was virtually identical to that of the CAA. And as with the CAA, Congress made clear that the "whenever . . . appropriate" language was intended to encourage citizen enforcers, and provide for awards to defendants only when cases were "frivolous." *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 81 (1971) ("The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing.").

By the time the citizen suit provision of CERCLA was adopted in 1986, Congress had echoed the "frivolous or harassing" language in the legislative history of a number

of environmental statutes,[12] and it did so again with CERCLA. CERCLA provides for an award of fees to "the prevailing or substantially prevailing party whenever the court determines such award is appropriate." The Senate Report accompanying CERCLA states:

> As with similar provisions in other environmental citizens suit laws, this will encourage private enforcement by allowing such awards to private

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[12] *See, e.g.*, Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (court may award fees to any party "whenever appropriate"); S. Rep. No. 92-451, *reprinted in* 1972 U.S.C.C.A.N. 4234, 4249-50 (court may award fees to defendant if "the court concludes that the purpose of the suit was harassment. . . . "); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (court may award fees to party "whenever the court determines such award is appropriate"); H. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973) (fee provisions are to "be interpreted in the same fashion" as the MPRSA); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (court may award fees to party "where the court determines such award is appropriate."); S. Rep. No. 231, 93d Cong., 1s: Sess. 17 (1973) (court may award fees to prevailing defendants only "as a deterrent against frivolous suits. . . . "); Toxic Substances Control Act of 1976, 15 U.S.C. § 2618(d) (fees may be awarded "if the court determines such award is appropriate"); 122 Cong. Rec. 8300 (March 26, 1976) ("The standard for awarding fees and costs to a prevailing defendant is not the same as for a plaintiff because, if it were, the risk to the average citizen of bringing suit under this section would be so great that it would discourage such suits") (Statement of Senator Tunney in support of S. 3149); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (court may award fees to any party "whenever the court determines such award is appropriate."); S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977) (court may award fees to defendant only if defendant shows suit was brought in "bad faith" – standard is intended to be the same as for other environmental laws).

> plaintiffs where the court determines the bringing of the action was in the public interest, while discouraging frivolous suits by allowing costs to be awarded to defendants in appropriate cases.

S. Rep. No. 11, 99th Cong., 1st Sess. 63 (1985).[13]

Congress has extensive experience in drafting citizen suit legislation, and is well aware of the dual standard that courts, including this Court, have applied in cases where citizens have been authorized to enforce public laws. Congress has consistently expressed approval of that standard. Far from supporting Hecla's argument, the legislative history of the CWA, CERCLA, and other environmental legislation supports the Ninth Circuit's application of the *Christiansburg* standard to Hecla's fee application in this case.

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[13] The Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act, or RCRA), contains fee-shifting language similar to other environmental legislation. 42 U.S.C. § 6972(e). Although the legislative history of this provision does not discuss the dual standard or the meaning of "whenever . . . appropriate," courts interpreting the provision have determined that the dual standard applies, based on this Court's reasoning in *Christiansburg*, *Ruckelshaus*, and *Pennsylvania v. Delaware Valley Citizens Council*, *supra*. *See PaineWebber Income Prop. v. Mobil Oil*, 916 F. Supp. 1239, 1243-44 (M.D. Fla. 1996); *Palumbo v. Waste Technologies Industries*, 1994 U.S. App. LEXIS 29355 (4th Cir. Oct. 20, 1994); *Truck Components, Inc. v. Beatrice Co.*, 1996 U.S. Dist. LEXIS 9946 (N.D. Ill. July 15, 1996).

II. THERE IS NO DISCREPANCY AMONG THE LOWER COURTS FOR THIS COURT TO CLARIFY

Hecla's statement that lower courts are applying "a multiplicity of ad hoc standards" (Petition, at 23) stems from a gross misreading of numerous court opinions. Hecla is attempting to create confusion where none exists. In reality, lower courts are uniformly applying the dual standard when making fee determinations in environmental citizen suits. Respondents are unaware of any decision in which a court has applied the unlimited discretion that Hecla asks this Court to approve. There is simply no unsettled law for this Court to clarify.

Hecla points to four cases in which, it argues, courts did apply such a standard. Even a generous reading of the brief fee discussions in those cases, however, does not support Hecla's argument. Other than reciting statutory language, none of the courts elaborated on the basis for their fee decisions. Hecla seems to believe that the courts' recitation of statutory language alone is equivalent to pronouncing that those courts were using a single discretionary standard, rather than the dual standard endorsed by this Court. This is not correct.

In *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1175 (5th Cir. 1987), and *Pape v. Manistisque Papers, Inc.*, 114 F.3d 1188 (6th Cir. 1997), the two cases in which a prevailing defendant was awarded fees, the claims were summarily dismissed, one for lack of evidence and the other for lack of standing and jurisdiction over pendent state law claims. Without any express statement from these courts as to the standard they applied, the facts of the cases strongly imply that the courts used the dual standard

and, upon finding the plaintiffs' claims to be frivolous, awarded fees to the prevailing defendant. In the remaining two cases cited by Hecla, the courts declined to award fees to the prevailing defendant. *See Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 670 (E.D. Mich. 1992); *Environmental Compliance Oversight Corp. v. SmithKline Beecham Corp.*, 1994 WL 675297 (E.D. Pa. Nov. 21, 1994). These cases contain so little discussion regarding the bases for their fee decisions, that one can only guess, as Hecla did, as to the standard that the courts applied.

In contrast, courts throughout the circuits routinely apply the dual standard and consistently require prevailing defendants to establish, as the Ninth Circuit does, that a plaintiff's claim was "unreasonable, frivolous, or without foundation." *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995). *See Atlantic States Legal Foundation v. Onondaga Department of Drainage and Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995) ("frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it became so"); *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819, 821 (E.D. Wash. 1993) ("meritless, groundless, or without foundation"); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 63 (W.D. Mich. 1989) ("frivolous, meritless, or vexatious"); *Consolidated Edison Co. v. Realty Investment Assoc.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) ("objectively frivolous"). Hecla's claim that these virtually identical standards are "ad hoc" and "confusing" is simply wrong.

Hecla also points to some courts' references to bad faith or vexatious conduct as a sign of confusion regarding the proper standard for fee awards. Petition at 24. Bad faith, however, is a separate and additional ground that,

if established, would also warrant an award of fees to a prevailing defendant. *See* 28 U.S.C. § 1927 (authorizing an award of fees against any attorney who "multiplies the proceedings in any case unreasonably and vexatiously"); *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116, 129 (1974) ("We have long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, or for oppressive purposes."). Courts have not required prevailing defendants to establish bad faith in addition to a groundless or frivolous claim, but have merely noted that bad faith may separately justify an award of fees. *See, e.g., PaineWebber Income Props. v. Mobil Oil Corp.*, 916 F. Supp. 1239, 1242 (M.D. Fla. 1996) (citing common law standard); *Washington Trout*, 823 F. Supp. at 821 (citing 28 U.S.C. § 1927).

CONCLUSION

Hecla has presented no reason, much less any compelling reason, for this Court to revisit the well established standard that prevailing defendants must show that citizen plaintiffs acted frivolously or unreasonably before such defendants may recover attorney fees under the CWA and CERCLA. Respondents respectfully request that this Court deny Hecla's petition for a writ of certiorari.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

October Term, 1998

HECLA MINING COMPANY,

Petitioner,

v.

WASHINGTON WILDERNESS COALITION, OKANOGAN HIGHLANDS ALLIANCE, and ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, AMERICAN FOREST & PAPER ASSOCIATION, INC., AND ALASKA MINERS ASSOCIATION IN SUPPORT OF PETITIONER

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IDENTITY AND STATEMENT OF INTEREST OF THE *AMICI CURIAE*

This brief of *amici curiae*, the Chamber of Commerce of the United States of America, *et al.*, is submitted in support of the petition for writ of certiorari filed by Hecla Mining Company. Like Petitioner, *amici* submit that the Court should grant the petition and decide whether the lower courts should continue to hold prevailing defendants to a much higher standard than that applied to prevailing plaintiffs when ruling on a request for attorney's fees in environmental citizen suits.[1]

Amicus Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

Amicus the National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the National Association of Manufacturers through its Associations Council and National Industrial Council.

Amicus the National Mining Association is the national trade association for the mining industry whose members are the producers of most of America's coal, metals, industrial

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[1] Pursuant to Rule 37 of the Rules of this Court, the *amici* have obtained letters of consent to the filing of this brief from the parties and have filed those letters with the Clerk of the Court. Additionally, pursuant to Rule 37, this brief was authored, prepared and paid for in its entirety by the *amici*.

and agricultural minerals. Its members also include manufacturers of mining and mineral processing machinery, equipment and supplies, as well as engineering firms and financial institutions that serve the mining industry.

Amicus Corporate Environmental Enforcement Council ("CEEC") is an organization of 25 diverse companies with a strong commitment to the environment and environmental compliance. CEEC focuses exclusively on environmental enforcement and compliance issues, working to ensure that environmental enforcement is consistent with our environmental laws and advances the goals of those laws.

Amicus American Forest & Paper Association, Inc. is a non-profit trade association for over 250 member companies engaged in growing, harvesting, and processing wood and wood fiber and manufacturing pulp, paper and paperboard products from both virgin and recycled fiber, and solid wood products. Its member companies account for over eight percent of the total U.S. manufacturing output.

Amicus Alaska Miners Association ("AMA") is a non-profit corporation whose members include individuals and companies engaged in the exploration, development and mining of Alaska's coal and hard mineral resources, as well as supporting industries. The purpose of the AMA is to promote the mining industry and development and use of Alaska's mineral resources.

SUMMARY OF ARGUMENT

Amici are trade associations or representatives of industries and businesses that have demonstrated a commitment to public health and the environment as well as a fair and even-handed enforcement of environmental laws. Their members are the industries and businesses charged with the important duty of complying with environmental laws and regulations and therefore have a keen awareness and interest in compliance and fair enforcement.

In the environmental area, Congress has mandated a two-tiered enforcement approach. The primary enforcers are the Executive Branch, through the EPA and the Department of

Justice, and the individual states, who have been delegated some of the authority to administer many of the congressionally-created programs. A secondary and carefully limited enforcement role is accorded to private citizens, who may bring citizen actions, after notice to an alleged offender and an opportunity to cure. Congress was wary of providing too much authority to citizen enforcers and ensured that citizens were not to be co-equals of the government authorities.

In enacting these citizen suit provisions, Congress also provided for fee-shifting to encourage the bringing of meritorious actions but also to discourage the filing of actions that result in little or no benefit to the environment. These fee shifting provisions are neutral on their face, favoring neither citizen plaintiffs nor regulated defendants.

At issue here are the fee-shifting provisions of the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which grant discretion to the district courts to award attorney's fees to a prevailing party in a citizen action without distinguishing between prevailing plaintiffs and defendants. Unfortunately, the Court of Appeals for the Ninth Circuit below, relying on *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978), engrafted onto these neutral provisions a barrier to prevailing defendants when they seek their fees: a prevailing defendant may recover its fees only if the plaintiff's action is frivolous or without foundation – essentially applying the Rule 11 standard to prevailing defendants' fee petitions. There is simply no indication in either the language of the statutes or their legislative history that Congress intended such a distinction.

The importance of this Court's review of the decision below is underscored by the huge number of companies and industries potentially affected by this issue. For example, over 900,000 facilities are subject to reporting requirements of the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 62 Fed. Reg. 23834, 23884-85 (May 1, 1997); 61 Fed. Reg. 67017, 67018 (Dec. 19, 1996); *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49

(June 1991) GAO/RCED 91-121. Over 130,000 facilities are regulated under the discharge permitting requirements of the CWA.[2] Over 25,000 facilities are subject to the Title V permitting requirements of the Clean Air Act ("CAA"). 61 Fed. Reg. 30061, 30062 (June 13, 1996). Almost 21,000 generators of hazardous waste and 2,000 treatment, storage and disposal facilities are subject to the standards and permitting requirements of the Resource Conservation and Recovery Act ("RCRA"). *Executive Summary/The National Biennial RCRA Hazardous Waste Report (Based on 1995 Data)*, August 1997, at ES-3, 4 (available at www.epa.gov/epaoswer/hazwaste/data/br95). All of these entities, being subject to environmental regulation, are also potentially subject to environmental citizen suits and their fee-shifting provisions.

Amici recognize the citizen enforcement role, and where citizen plaintiffs are successful, the discretion of the court to award attorney's fees. But *amici* also recognize that their members might be and have been forced to defend citizen claims and, when successful, should not automatically be denied their fees. The importance of the question presented to the Court is underscored by the huge number of companies and industries that are subject to environmental regulation, and that, therefore, are also subject to environmental citizen suits and their fee-shifting provisions. In short, *amici* simply ask that the district courts be allowed to exercise their discretion when determining whether an award of attorney's fees is appropriate under the environmental fee-shifting provisions.

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[2] Based on a telephone conversation with Mr. Brian Rittenhaus of the EPA Office of Wastewater Management/Permits Division.

ARGUMENT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION TO DECIDE WHETHER THE DUAL STANDARD SHOULD CONTINUE TO BE USED IN AWARDING ATTORNEY FEES UNDER THE ENVIRONMENTAL FEE-SHIFTING STATUTES

A. Congress Intended That the District Courts Would Exercise Their Discretion When Awarding Attorney's Fees in Environmental Citizen Actions

In enacting the fee-shifting provisions of the CWA and CERCLA, the statutes at issue here, Congress did not distinguish between prevailing plaintiffs and defendants. It rejected a dual standard and instead opted for neutral language, providing that the district courts may award costs of litigation "to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 33 U.S.C. § 1365(d), 42 U.S.C. § 9659(f). Nor did Congress distinguish between prevailing plaintiffs and defendants in the fee-shifting provisions of other environmental statutes, likewise providing the district courts with discretion to determine when an award of fees is appropriate.[3]

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[3] Congress also used the "prevailing or substantially prevailing party, whenever the court determines such an award is appropriate" language when it enacted the RCRA, 42 U.S.C. § 6972(e), and EPCRA, 42 U.S.C. § 11046(f). Under the CAA, 42 U.S.C. § 7607(f), Toxic Substances Control Act, 15 U.S.C. § 2618(d), and Endangered Species Act, 16 U.S.C. § 1540(g)(4), Congress provided that the district courts may award fees "whenever it determines such an award is appropriate." Although the "prevailing party" language is absent from these provisions, this Court in *Ruckelshaus v. Sierra Club*, 462 U.S. 680 (1983), examined this language and held that only prevailing parties are eligible for fee awards. Thus, under *Ruckelshaus*, the differences in the language Congress used are of no consequence and the fee-shifting provisions of the environmental statutes are to be interpreted identically – a court may award fees to "the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate."

Despite Congress using this neutral language, the Ninth Circuit and other courts have engrafted onto these fee-shifting provisions a much higher standard when a prevailing defendant seeks to recover its fees. *See, e.g., Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (in CWA and RCRA suits, prevailing defendant may not recover its fees unless plaintiff's action was frivolous or without foundation); *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62, 65 (W.D. Mich. 1989) (same in CWA suit); *Consolidated Edison Co. v. Realty Investments Assocs., L.P.*, 524 F. Supp. 150, 153 (S.D.N.Y. 1981) (same under CAA).[4] There is simply no indication, however, that Congress intended the stricter standard to apply to a petition for attorney's fees brought by a prevailing environmental citizen suit defendant. To the contrary, the language of the statutes endorses, if anything, an even-handed treatment of prevailing plaintiffs and defendants and shows, at the very least, that Congress left to the district courts' discretion to determine when it was appropriate to award fees to a prevailing defendant.

Nor does the legislative history of the environmental fee-shifting provisions provide any support for the dual standard. As Petitioner points out, an early version of the CWA mandated that prevailing plaintiffs receive their attorney's fees. Congress deleted this language, however, and replaced it with the neutral provision authorizing the district courts to award fees to either prevailing party. Cert. Pet. 14.

Also, in debating the wisdom of giving such unprecedented enforcement authority to private citizens, some members of Congress questioned whether some plaintiffs would use the citizen suit provisions to bring "frivolous and harassing actions." To deter this abuse, Congress provided that the courts could award fees to either party "whenever the court

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[4] Other courts have even gone beyond the *Christiansburg* standard and injected an element of "bad faith." Still others apply a modified *Christiansburg* approach. *See* Cert. Pet. 23-24. The result is an unclear area of the law that warrants this Court's review.

determines such an action is in the public interest." *Reprinted in Natural Resources Defense Council v. Train*, 510 F.2d 692, 725-26, 728-29 (D.C. Cir. 1974) (relevant legislative history of CAA of 1970).[5] As in the statutes, there is simply no indication in the legislative history that Congress intended to limit the district courts' discretion in determining whether an award of fees is appropriate.

The best indicator of congressional intent is, of course, the language of the statutes. And, it is clear that Congress did not limit prevailing defendants to an award of fees, as it has done under several other statutes (*see* Section I.B., below), only if a plaintiff's action is frivolous or without foundation. The Ninth Circuit has run afoul of the principal canon of statutory construction: when the text of a statute is clear, the court's interpretive inquiry ends. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

B. Congress Could Have Easily Mandated the Dual Standard

Had Congress wished to apply a dual standard to fee petitions brought by prevailing environmental citizen suit defendants, and thus condition the award of fees on certain behavior of the plaintiff, it easily could have done so. The Ninth Circuit's standard ignores the many instances where Congress has adopted the dual standard when it wished to make it more difficult for the prevailing defendant to recover its attorney's fees. For example, the Administrative Procedure Act expressly provides that costs of litigation, including attorney's fees, may be awarded to the substantially prevailing party, "except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes." 5

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[5] Nothing in the legislative history indicates that prevailing defendants should recover their fees "only where the action may be fairly characterized as frivolous or harassing," as one court misread the history. *Consolidated Edison*, 524 F. Supp. at 153.

U.S.C. § 552b(i). Likewise, in certain antitrust cases, district courts shall:

> (1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or
>
> (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

15 U.S.C. § 4304(a); *see also* 15 U.S.C. § 15c(d) (in antitrust actions brought by a state, court may award fees to prevailing defendant if "the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."); 31 U.S.C. § 3730(d)(4) (in *qui tam* actions, court may award fees to prevailing defendant if plaintiff's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."); 42 U.S.C. § 11113 (in antitrust actions under Health Care Quality Improvement Act, court shall award fees to prevailing defendant if plaintiff's claim was "frivolous, unreasonable, without foundation, or in bad faith."); 49 U.S.C. § 60121(b) (under Pipeline Safety Act, court may award attorney's fees to any prevailing plaintiff, but may award fees to prevailing defendant only "when the action is unreasonable, frivolous, or meritless.") In contrast, although it easily could have, Congress did not so distinguish between prevailing plaintiffs and prevailing defendants when it enacted the CWA and CERCLA, as well as other environmental statutes, illustrating that it rejected the dual standard adopted here by the Ninth Circuit.

By advancing the one-sided "frivolous or without foundation" standard, the Ninth Circuit has effectively ruled that a prevailing environmental citizen suit defendant may recover its fees only when the plaintiff's action violates Rule 11. *See* Fed. Rule Civ. Proc. 11(b) (a plaintiff violates Rule 11 if its complaint is frivolous or without support). Consequently, apart from disregarding the clear language of the statutes, the

Ninth Circuit's standard is additionally questionable because it is already established under Rule 11 that a prevailing defendant may be awarded its fees if a complaint is frivolous or without foundation, even in the absence of a fee-shifting provision.

Under a nearly identical fee-shifting statute, the Copyright Act, this Court recently found that prevailing plaintiffs and defendants must be treated alike. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). Similar to the environmental statutes, the Copyright Act provides that "the court may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505. This Court found that the statutory language gave "no hint that successful plaintiffs are to be treated differently from successful defendants." *Id.* at 522.

This Court also found that the legislative history of the Copyright Act "provides no support for treating prevailing plaintiffs and defendants differently with respect to the recovery of attorney's fees." *Id.* at 523. As noted above, the legislative history of the environmental provisions likewise provides no support for the Ninth Circuit's position that prevailing plaintiffs and defendants should be treated differently. Here we have essentially identical language receiving vastly different treatment: this Court found that the neutral language of the Copyright Act must be given an even-handed interpretation, while the courts construing the same language of the environmental statutes have concluded that a harsh, dual standard should be applied.

Accordingly, the language of the statutes, their legislative history, and this Court's ruling in *Fogerty* contradict the Ninth Circuit's decision. The Court should grant Hecla Mining's petition to resolve the uncertainty created by the conflicting interpretations of this congressional language.

II. THE FACTORS THAT MOTIVATED THIS COURT IN *CHRISTIANSBURG* ARE NOT PRESENT HERE

The Ninth Circuit, with no analysis, adopted the standard articulated by this Court in *Christiansburg* as the standard to be applied to environmental fee-shifting provisions. *Razore*, 66 F.3d at 240 (where the Ninth Circuit simply stated that, "We agree with the district court that *Christiansburg*" is the proper standard).[6] Other courts have also unhesitatingly adopted *Christiansburg*. *See*, *e.g.*, *National Wildlife*, 729 F. Supp. at 64. In *Christiansburg*, this Court was asked to decide what standard should apply to a claim for attorney's fees by a prevailing defendant in a Title VII employment case. Focusing on congressional policy that Title VII plaintiffs were "the chosen instrument of Congress" to enforce civil rights laws, this Court held that prevailing Title VII defendants may recover their fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 418, 421.

In *Fogerty*, the respondent contended that *Christiansburg* supported different treatment for prevailing plaintiffs and defendants. *Fogerty*, 510 U.S. at 522. Finding that the objectives of the Copyright Act and Civil Rights Act were "not completely similar," this Court easily distinguished *Christiansburg*. In particular, the Court stressed that in the civil rights context:

> impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees. . . . In the copyright context, it has been noted that "[e]ntities which sue for copyright

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[6] In this case, the Ninth Circuit simply referred to *Razore* as the "settled law of this circuit." Cert. Pet. 4a.

> infringement as plaintiffs can run the gamut from corporate behemoths to starving artists. . . .

Id. at 524 (citation omitted).

Here, Respondents most surely will maintain that *Christiansburg* should also inform a district court's discretion when it is asked to rule on a prevailing environmental citizen suit defendant's petition for attorney's fees. As this Court found with Copyright Act suits, the policy considerations at work in *Christiansburg* are also absent in most environmental citizen litigation. In civil rights cases, the plaintiff is typically an individual or class of individuals seeking to vindicate personal rights against an employer, municipality, or other entity with greater resources. In environmental citizen litigation, on the other hand, plaintiffs are often large, well-funded organizations devoted to bringing lawsuits.

In this case, the district court aptly found that, "Plaintiffs are public interest groups, but they are also professional litigants." Cert. Pet. 50a. Indeed, citizen plaintiffs draw financial support from huge memberships and, bolstered by the environmental fee-shifting provisions, have used those contributions to bring thousands of lawsuits under the environmental statutes.[7] Consequently, the kind of plaintiff bringing environmental citizen litigation often resembles much more the "behemoth" noted in *Fogerty* than the impecunious plaintiff that influenced the Court in *Christiansburg*.

Some courts have applied the *Christiansburg* standard to prevailing citizen suit defendants seeking their fees because they did not want to unreasonably deter citizen plaintiffs from bringing meritorious actions. *See*, *e.g.*, *National Wildlife*, 729

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[7] Perhaps energized by the fee-shifting provisions, typical citizen plaintiffs are hardly ever individuals, but rather large, well-funded, national organizations. Today, the Natural Resources Defense Council has more than 170,000 members nationwide. The Sierra Club has more than 500,000 national members. State Public Interest Research Groups have over 1 nillion members. They, and many others, are extremely active in environmental litigation. *See* Brief *Amici Curiae* of Natural Resources Defense Council, et al., *Steel Co. v. Citizens for a Better Env't*, No. 96-643, at 1 n. 2.

F. Supp. at 64. However, this concern is misplaced because a court may consider, as part of the exercise of its discretion, whether a fee award to a prevailing defendant in a particular case would unfairly burden a plaintiff or have any "chilling effect" on potentially deserving plaintiffs.[8] Therefore, even if Congress intended to avoid such an effect, there is no need to read into these statutes a requirement that a prevailing defendant *automatically* be denied its fees unless it demonstrates that the plaintiff's action violated Rule 11. *See also Fogerty*, 510 U.S. at 535 n. 19 (factors that may be used to guide a district court's discretion include "motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.")

III. THE COURT SHOULD GRANT THE PETITION BECAUSE THE NINTH CIRCUIT'S DECISION PERMITS CITIZEN PLAINTIFFS TO ENCROACH UPON THE EXECUTIVE BRANCH'S ENFORCEMENT AUTHORITY

By enacting environmental citizen suit provisions, Congress decided that citizens may act as private attorneys general and aid in enforcing environmental laws. Congress did not, however, place citizen plaintiffs on an even plane with Executive Branch enforcement officials and endow them with the full panoply of Article II enforcement authority. Rather, Congress limited citizen enforcement in several significant ways. It required a would-be citizen plaintiff to first provide notice of the alleged violation to the EPA, the state and the alleged violator at least 60 days before filing suit. *See, e.g.*, 33 U.S.C. § 1365(b)(1)(A). The purpose of the notice period is two-fold: (1) it gives the alleged violator the opportunity to

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[8] The parties' resources is but one factor a court could consider in deciding whether an award of fees is appropriate. *See, e.g., Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 828-31 (7th Cir. 1984) (one of the factors district court may consider in awarding fees to an ERISA prevailing defendant is plaintiff's ability to pay).

bring itself into compliance, thus rendering a citizen suit unnecessary; and (2) it also allows the government the opportunity to determine whether it should utilize its own authority to enforce compliance, which likewise bars a citizen suit. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989); *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987). Similarly, to ensure that remediation of contaminated waste sites will not be hindered by the "potentially intrusive" citizen plaintiff, *see Gwaltney*, 484 U.S. at 61, Congress prohibited citizen suits where the EPA is already undertaking removal or remedial action at a site. 42 U.S.C. § 9613(h). Further, a citizen plaintiff may not recover civil penalties (or any type of damages) for itself. Rather, these penalties are payable to the United States Treasury. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1018 (1998).

The various checks on environmental citizen enforcement demonstrate that Congress was not interested in simply maximizing the number of citizen suits brought under environmental statutes. This Court has long noted that, while Congress provided for citizen participation in enforcing environmental laws, Congress intended citizen suits only "to supplement, not supplant, governmental action." *Gwaltney* 484 U.S. at 60. And while in the civil rights context Congress sought to maximize citizen litigation to eradicate discrimination, in authorizing environmental citizen suits Congress sought "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. The policies served by the CWA and CERCLA (and the other environmental statutes) are "more complex, more measured than simply maximizing the number of" citizen suits. *See Fogerty*, 510 U.S. at 526. Far from being Congress's "chosen instrument" to enforce environmental laws – which remain the federal and state environmental agencies – Congress relegated the citizen plaintiff to a much-restricted, secondary role.

If the dual standard is allowed to prevail, citizen suit defendants will continue to be deterred from fully litigating meritorious defenses because they are faced with payment of

plaintiff's fees if they are unsuccessful and, on the other hand, have no expectation that they will be able to recover their own attorney's fees, no matter how meritorious and successful their defenses. It often simply makes more business sense to settle quickly on the plaintiff's terms and avoid protracted litigation that may lead to paying both parties' attorney's fees (in addition to sizable civil penalties). This puts a citizen suit defendant in a lose-lose situation. If it loses, it must not only pay the plaintiff's attorney's fees, it must also pay its own. And if it wins, it still must pay its own attorney's fees (except in the rare case where the plaintiff violates Rule 11). "Indeed, if there is any difference between the [plaintiff and defendant] we must remember that it wasn't the defendant who chose to litigate." *Cohen v. Virginia Electric & Power Co.*, 617 F. Supp. 619, 622 (E.D. Va. 1985) (holding that prevailing copyright plaintiffs and defendants should be treated alike when awarding fees), *aff'd on other grounds*, 788 F.2d 247 (4th Cir. 1986).

In enacting these fee-shifting statutes, Congress clearly intended to alter the American Rule, albeit by providing the district courts with the discretion to determine when a fee award is appropriate. The Ninth Circuit has distorted that intent by fashioning an "enhanced British Rule," whereby a prevailing plaintiff almost always gets its fees while the prevailing defendant almost never does. Given this imbalance in litigation strengths, a plaintiff has an incentive to adopt uncompromising positions knowing that the defendant is faced with a "running meter" and always has to consider the possibility of having to pay both sides' attorney's fees.

Allowing the district courts to exercise their discretion in determining when an award of attorney's fees is appropriate would force citizen plaintiffs to consider more critically whether bringing a suit will actually further the public interest. In the instant action, the district court essentially found that plaintiffs had no legitimate reason to file their action because the Washington Department of Ecology had already taken the appropriate steps to address any environmental harm that could result from the discharges at issue:

> This action turned awkward on the eve of trial. It became less of a public interest case after plaintiffs abandoned their claim for injunctive relief. As the evidence unfolded, it appeared even less of a public interest case. . . . The point of this suit was not to close the Aspen Pond and save the environment. DOE had already done that.

Cert. Pet. 19-20. Eliminating the automatic prohibition on a defendant recovering its fees would serve and further Congress's intent that citizen plaintiffs be encouraged to bring actions that benefit the environment and discouraged from filing actions that are of marginal or no value to society.

It is important that defendants not be chilled from asserting their rights because one major purpose of litigating defenses to citizen suits is to define the scope of citizen suit enforcement authority. *See, e.g., Steel Co.* 118 S. Ct. 1003 (an interest in attorney's fees or civil penalties does not afford citizen plaintiff standing to sue); *Hallstrom*, 493 U.S. 20 (citizen plaintiff must strictly comply with statutory notice requirements before bringing suit); *Gwaltney*, 484 U.S. 49 (Congress did not intend that citizen plaintiffs be allowed to sue for past violations). If citizen suit defendants are hesitant to fully litigate meritorious defenses, the congressional mandate that citizen plaintiffs only supplement governmental enforcement authority will be undermined. Maintaining the dual standard allows citizen suit plaintiffs to assume an enforcement role larger than that intended by Congress because, given the prospect of paying the, often substantial, attorney's fees of both parties, defendants often find themselves compelled to yield to the citizen plaintiff's demands. If the decision below is allowed to stand, the finely-crafted congressional balance between governmental and citizen enforcement authority will continue to be thwarted by the inappropriate incentives created by the dual standard.

Congress recognized the basic principles of fairness and the balance between the interests of citizen plaintiffs and government enforcement when it enacted the fee-shifting provisions with no distinction between prevailing plaintiffs and defendants. Under the Ninth Circuit's dual standard, however,

a citizen suit defendant who helps to define the proper scope of citizen suit enforcement by maintaining meritorious defenses is unable to recover its attorney's fees. To maintain the proper citizen plaintiff's role and ensure that it does not encroach upon the Executive's authority, this Court should grant the writ and decide whether the dual standard is appropriate for environmental citizen actions. As with copyright law, it is important that the boundaries of private citizen suit enforcement authority "be demarcated as clearly as possible." *Fogerty*, 510 U.S. at 527.

In the past, the Executive Branch has expressed concern that citizen plaintiffs may have replaced government officials as the party that controls enforcement policy. When Congress was considering the reauthorization of the Clean Water Act in 1987, the Department of Justice testified that the flood of private enforcement actions under the CWA was coming dangerously close to producing the result Congress apparently meant to prevent – a shift of control over enforcement from the government to private parties. *See* Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *Environmental Politics: Public Costs, Private Rewards* 105, 120 (Praeger Publishers 1992). These concerns are just as legitimate today because citizen organizations continue to file hundreds of citizen suits, the fee-shifting provisions sometimes being used as a thinly-veiled fund-raising mechanism. Cert. Pet. 2 n. 2; Greve, *Private Enforcement*, at 109-110.

Courts can play their role only when construing cases and controversies arising under the environmental laws. But with a dual standard applied to requests for attorney's fees, citizens suit defendants with meritorious defenses are discouraged from asserting those defenses, finding a greater than usual incentive to settle. The plaintiffs' incentives to settle, however, is diminished because it can drive a hard bargain knowing that the defendant faces the prospect of paying double fees if its defenses fall short. Additionally, given the dual standard, citizen plaintiffs are also encouraged to bring

cases of questionable merit or of doubtful value to the environment, cases that the EPA would decline to pursue.[9] Consequently, the congressionally crafted balance between government and citizen enforcers is harmed, and citizen plaintiffs are able to arrogate power that Congress never envisioned.

"A fair adversary process presupposes both a vigorous prosecution and a vigorous defense." *Christiansburg*, 434 U.S. at 419. "Defendants who seek to advance a variety of meritorious . . . defenses should be encouraged to litigate them to the same extent that Plaintiffs are encouraged to litigate meritorious claims." *Fogerty*, 510 U.S. at 527. By not distinguishing between prevailing plaintiffs and defendants, Congress intended to maintain this balanced adversary process by giving both plaintiff or defendant the fair opportunity

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[9] The EPA acknowledges that even properly operated and maintained facilities will sometimes violate their permitted limits. *See*, *e.g.*, *United States v. Marine Shale Processors*, 81 F.3d 1329, 1336 (5th Cir. 1996) (the EPA's Training Manual for NPDES Permit Writers concedes that a properly operated facility has only "a 95 to 99 percent chance of complying with its permit limits."); 47 Fed. Reg. 52006, 52018 (Nov. 18, 1982) (even at properly designed and operated facilities, certain effluent limits will result in three to four violations each year because of the statistical method used by the EPA to select the limits). Because the EPA knows that violations will result despite the best intentions and equipment, it will "exercise prosecutorial discretion" and not seek penalties for every violation. In exercising its discretion, the EPA considers factors such as the harm posed by a violation, the possibility of recurrence and the facility's compliance history. *See*, *e.g.*, 62 Fed. Reg. 8314, 8118 (Feb. 24, 1997); 47 Fed. Reg. at 52018 (although CWA is a strict liability statute, enforcement by the EPA is discretionary and, "We have exercised and intend to exercise that discretion in a manner that recognizes and promotes good faith compliance efforts.") In contrast, the citizen prosecutor is not bound to follow the Agency's enforcement policies or the U.S. Constitution and has no economic interest in settling for less than the maximum amount possible. *See* Greve, *Private Enforcement*, at 109-113. *See also Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976) ("(T)here is no authorization to block a citizen's suit . . . even though the agency believes that the suit should not go forward.")

to recover their fees upon prevailing. Simply put, there is nothing to indicate that Congress intended to distort the balance in the adversary process by providing well-funded citizen plaintiffs considerable incentives to sue, while chilling the advocacy of a defendant to vindicate its rights by forcing it to risk paying both its own attorney's fees and those of the plaintiff.

This case presents a rare opportunity for the Court to address the apparent principal reason why citizen plaintiffs have come close to displacing governmental agencies as the primary enforcers of environmental laws – the unequal and, *amici* suggest, unfair treatment courts apply when ruling on petitions for attorney's fees under the environmental fee-shifting provisions. The Court should grant the petition to determine whether the *Christiansburg* standard should continue to apply to prevailing environmental citizen suit defendants.

CONCLUSION

The Ninth Circuit's decision promotes disproportion and unfairness in the prosecuting and defending of environmental citizen suits. This disparity places regulated entities in an untenable position by subjecting them to an imbalance of power in these cases. To ensure fair treatment in this important area of federal law, this Court should grant the writ of certiorari and determine whether the *Christiansburg* standard should continue to be applied to the citizen suit fee-shifting provisions of environmental statutes.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Hecla Mining Company,

Petitioner,

v.

Washington Wilderness Coalition, Okanogan Highlands Alliance,
and Atlantic States Legal Foundation, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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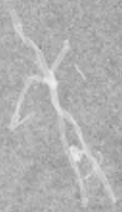

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SUMMARY OF ARGUMENT

Both the Respondents and Amici Curiae emphasize that the issue raised by Hecla Mining Company ("Hecla") is one of great national importance, and that its resolution by this Court will have a substantial impact on the course of litigation arising under federal environmental laws, such as the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Given the pervasiveness of such litigation, the Court's decision in this case will impact essentially every industrial sector of the U.S. economy.

Turning to Respondents' arguments on the merits, Respondents mischaracterize Hecla's position, and this Court's analysis in other attorneys fee cases. Respondents' argument boils down to the untenable propositions that the plain language of the CWA and CERCLA should be ignored, and that because federal environmental laws supposedly serve the same purposes as the federal civil rights laws, they should be interpreted identically. However, the unique role played by plaintiffs seeking to enforce their rights under the civil rights laws is unmatched by the role of environmental groups seeking to litigate under the federal environmental laws. Consequently, given the plain language of the CWA and CERCLA, and the distinct purposes served by those laws, there is no defensible reason to treat prevailing plaintiffs and defendants who seek recovery of their attorney fees under these statutes in the dramatically disparate manner dictated by the Ninth Circuit's dual standard.

Because there is complete agreement among the parties that the issue presented in the Petition is of great importance, and because the Ninth Circuit's decision departs from sound legal analysis, Hecla's Petition should be granted.

ARGUMENT

I. THE PARTIES AND AMICI CURIAE AGREE THAT THE ISSUE PRESENTED IN THE PETITION IS OF NATIONAL SIGNIFICANCE

The CWA and CERCLA are two of the most ubiquitous federal environmental laws. See, e.g., Amici Curiae Brief, pp. 3-4. Respondents concur with Hecla that the interpretation of the attorney fee provisions of these statutes is of great significance. Respondents agree that the operation of these provisions dramatically impacts how environmental citizen suit provisions are utilized by environmental organizations and other citizens. Respondents conclude that the dual standard applied by the U.S. Court of Appeals for the Ninth Circuit creates significant incentives for bringing private citizen suits under federal environmental laws, and that an interpretation that allowed district courts greater discretion to award fees to prevailing defendants would substantially affect decisions as to when and whether such suits would be brought. Brief of Respondents in Opposition to Petition for Writ of Certiorari ("Opposition"), pp. 9, 17.

The conclusion that this is an important national issue is echoed by Amici Curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, National Mining Association, Corporate Environmental Enforcement Council, American Forest and Paper Association, Inc., and Alaska Mining Association. These amici curiae represent a broad cross-section of industries and business owners in this country, who are impacted by environmental citizen suits. Amici Curiae Brief, pp. 1-2. As the amici point out, the issue raised by Hecla is important to hundreds of thousands of businesses in this country since the interpretation of the attorneys fee provisions under the federal environmental laws not only

influences what suits will be brought, but also dramatically impacts the manner in which citizen suits are defended. Id. at 13-17.

Respondents do not dispute that there has been a substantial increase in the number of citizen suits brought in recent years under federal environmental laws, such as the CWA and CERCLA. Opposition, p. 5, n. 7. Respondents suggest only that if the majority of these suits were won by plaintiffs, this rise in litigation would be beneficial and consistent with Congress' intent. Id However, Respondents provide no basis for even suggesting that such are the facts. Instead, as discussed in the Brief of Amici Curiae, and as evidenced by the few reported cases arising under the federal environmental laws that have gone to trial, the vast majority of such suits settle out of court. Amici Curiae Brief, pp. 14-15. The mere fact that defendants have settled these cases given the strong disincentives to defend lawsuits created by the dual standard for attorney fee awards, is not evidence that the purposes of federal environmental statutes are being furthered. To the contrary, the widespread settlement of such cases suggests that the cost of settling even "winnable" cases is increasingly being treated as a cost of doing business in this country. While this may provide a de facto lawyer employment fund financed by consumers of products manufactured in this country, that certainly was not Congress' intent in enacting federal environmental statutes such as the CWA and CERCLA.

Because the interpretation of the attorney fee shifting provisions under the CWA and CERCLA is a significant issue that affects a broad cross-section of society, Hecla's Petition for Writ of Certiorari should be granted.

II. RESPONDENTS' ARGUMENT ON THE MERITS IS UNPERSUASIVE

A. Although Rejected By Both the District and Appellate Courts, Respondents Continue To Argue Their "Factual" Case.

In an attempt to persuade this Court that what the Ninth Circuit did in this case was acceptable regardless of whether a dual standard properly applies, Respondents reiterate many of their factual allegations that were rejected by the lower courts. See, e.g., Opposition, pp. 1-3. In the end, Respondents ask this Court to believe that their suit served an important role in somehow eliminating a substantial source of pollution that the State of Washington was ignoring. Id. at 2.

The lower courts recognized that Respondents' characterization is untrue. As summarized in Hecla's Petition, the State of Washington was closely regulating Hecla's historic mine site and had directed Hecla to cease all discharges in accordance with a specific schedule. Petition, p. 6. As a result, the Respondents' suit could not possibly serve any environmental protection purpose, and was brought solely to further penalize Hecla by seeking additional exactions, including fees for Respondents' lawyers. Apparently recognizing that there was nothing more that could be done to protect the environment, Respondents dropped their claim for injunctive relief prior to trial. Petition, p. 7.

Contrary to Respondents' suggestion that this is a case where attorney fees were properly denied, even if the Ninth Circuit's dual standard is inappropriate, this case exemplifies the types of circumstances that district courts should be permitted to consider in evaluating whether to award attorney fees to a prevailing defendant. The Ninth

Circuit's dual standard improperly prohibits such an evaluation.

B. Respondents Have Mischaracterized Petitioner's Analysis

In a misguided effort to minimize Hecla's position, Respondents suggest that Hecla is arguing that prevailing plaintiffs and prevailing defendants should always be treated identically for purposes of awarding fees. Opposition, p. 8. That is not Hecla's position. As detailed in its Petition, it is Hecla's position that, in accordance with the plain language of the CWA and CERCLA, and Congress' intent in enacting those statutes, district courts should have discretion in determining whether a prevailing defendant should be awarded fees based upon its evaluation of the particular facts of the case before it. What Hecla objects to is the Ninth Circuit's dual standard which narrowly circumscribes the circumstances under which a district court may award attorney fees to a prevailing defendant, and prohibits district courts from considering most of the facts before it. Consequently, Respondents' argument that this Court has rejected a single "mechanical" standard for awarding attorney fees to prevailing plaintiffs and defendants under Title VII is irrelevant. Opposition, p. 8 (discussing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)).

Attempting to further "radicalize" Hecla's position, Respondents repeatedly suggest that under Hecla's analysis, district courts would have "uncontrolled" or "unlimited" discretion in awarding fees, and would be free to ignore Congress' purposes in enacting the CWA and CERCLA. Opposition, pp. 5, 6, 17, 18. Again, Respondents' characterization of Hecla's argument is misleading. Hecla argues that the dual standard adopted by the Ninth Circuit is contrary to the purposes of the CWA and CERCLA, and

that district courts should be free to consider other factors that are consistent with Congress' purposes. In both this case and in Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995), the Ninth Circuit summarily adopted the Christiansburg dual standard that this Court employed to further Congress' specific purposes in enacting Title VII of the Civil Rights Act. The Ninth Circuit never even considered Congress' purposes in enacting the CWA or CERCLA.

What Hecla challenges in its Petition, is the Ninth Circuit's thoughtless transferral of a standard from the civil rights context to the realm of federal environmental regulation, which serves a dramatically different purpose in American society. Both Hecla and Amici Curiae have elaborated on the many differences between civil rights laws and federal environmental laws, such as the CWA and CERCLA. Petition, pp. 15-20; Amici Curiae Brief, pp. 10-14. Given those differences, there is no justification for applying Christiansburg's dual standard to the CWA and CERCLA. However, that does not mean that district courts may ignore the purposes of those statutes in exercising their discretion to award fees. Obviously, the purpose of the underlying statute is a factor the district courts should consider. Hecla's position is entirely consistent with this Court's analysis in Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), wherein the Court rejected transferral of Christiansburg's dual standard to another statutory context, but pointed out that Congress' statutory purposes are still relevant. In identifying some of the factors a district court may consider when exercising its discretion to award fees to a prevailing defendant under the Copyright Act, the Court pointed out that consideration of a range of factors is appropriate "so long as such factors are faithful to the purposes of the Copyright Act." 510 U.S. at 535, n. 19.

Contrary to Respondents' suggestion that Hecla would throw out the baby with the bathwater, the purposes of the CWA and CERCLA would remain important to a court's analysis in the absence of a dual standard. The issue before this Court is not whether federal district courts should have "unlimited" discretion to award attorney fees to prevailing defendants, but whether they should have discretion to weigh all of the facts before them, in light of the purposes Congress sought to promote in enacting the particular statute at issue.

C. Respondents Suggest Incorrectly That the Ninth Circuit's Dual Standard Is Consistent with Supreme Court Precedent

Respondents are incorrect in suggesting that the Ninth Circuit's importation of a dual standard into the CWA and CERCLA is consistent with Supreme Court precedent. Respondents state that, in Christiansburg, this Court held that a dual standard for attorneys fee awards should apply to all statutes in which citizen plaintiffs act as private attorneys general. Opposition, p. 7. There is simply nothing in Christiansburg whatsoever to suggest that the Court's holding had such breadth. Instead, Christiansburg's holding was narrowly tailored based upon a detailed analysis of Congress' intent in enacting Title VII of the Civil Rights Act. 434 U.S. at 418-22.

The differences between the purposes of Title VII, and the CWA and CERCLA are many. For example, as Respondents highlight, a primary reason for this Court's adoption of a dual standard under Title VII was its conclusion that individual plaintiffs were "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " Opposition, pp. 8-9 (quoting, Christiansburg, 434 U.S. at 418). However, as

discussed by Hecla and Amici Curiae, Congress determined that the federal and state governments were to have primary enforcement authority under the CWA and CERCLA, and that citizens were to play a secondary, supportive role. Petition, p. 17; Brief of Amici Curiae, pp. 12-13. Thus, in contrast to the civil rights laws, Congress' intent in enacting the citizen suit provisions of the CWA and CERCLA was "more complex, more measured than simply maximizing the number" of suits brought.[1] Fogerty, 510 U.S. at 526.

Respondents now ask this Court to ignore the delicate balance that Congress struck under the CWA and CERCLA, whereby Congress sought to control and limit pollution caused by industry, while ensuring the continued economic viability of this country. Unlike the Civil Rights Act, where Congress determined that no discriminatory behavior is appropriate, Congress has recognized that some "pollution" is a necessity in contemporary society. Providing some incentive for businesses to actively defend questionable citizen suits, rather than simply passing on the costs of a quick settlement to consumers as a cost of doing business in this country, fully promotes Congress' purposes in enacting the CWA and CERCLA.

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[1] Citing Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546 (1986), Respondents suggest that this Court has already held that the citizen suit provisions of federal environmental statutes and civil rights statutes should be interpreted the same. Opposition, pp. 14-15. That is incorrect. In Delaware Valley, the court compared these areas of law in considering only whether fees could be recovered by a prevailing plaintiff for time spent in certain administrative activities. The court did not in any way consider the issue presented here, or the unique roles that citizen plaintiffs play under the two statutory schemes.

D. Respondents' Ratification Theory Is Insupportable

Respondents' suggestion that Congress somehow ratified use of a dual standard under the CWA and CERCLA is untenable. Plaintiffs assert that by expressly incorporating a dual standard in the Pipeline Safety Act of 1976, Congress was somehow acknowledging that every time it used the very different language authorizing a fee award "whenever appropriate," it was really intending to apply a dual standard. Opposition, pp. 12-13. That suggestion is ridiculous. Congress' enactment of the Pipeline Safety Act in 1976 shows that Congress knew how to spell out a dual standard when it intended such a standard to apply. When Congress subsequently enacted CERCLA in 1980, it did not use dual standard language even though it had clearly done so in prior legislation where it intended such an interpretation. Congress' decision not to use express dual standard language in CERCLA or when it amended the CWA demonstrates its intent that a dual standard not apply.

E. The Legislative History Does Not Support Respondents' Position

Respondents argue that the legislative history of the CWA and CERCLA support application of a dual standard, because Congress acknowledged that a defendant would be protected from frivolous suits by the attorney fee recovery provisions. Opposition, pp. 17-21. However, rather than suggesting that prevailing in a frivolous lawsuit is the only situation where a defendant could recover its attorney fees, Respondents' selected references merely suggest that is one circumstance where a prevailing defendant is entitled to its fees.

That Congress believed the attorney fee recovery provisions would protect defendants from frivolous suits in no way supports a conclusion that there are no other circumstances under which a prevailing defendant should be allowed to recover its fees. This Court clearly acknowledged that in Fogerty, 510 U.S. at 535, n. 19. In rejecting application of a dual standard under the Copyright Act, the Court acknowledged that there are several factors that a district court should consider in determining whether an attorney fee award to a prevailing defendant is appropriate. Id. The Court stated that such factors include frivolousness, as well as motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence. Id. Thus, the recognition that frivolousness is one factor that a district court may consider in determining whether attorney fees are appropriate for a prevailing defendant in no way indicates that a narrow dual standard applies under which that is the only circumstance when fees may be awarded.

CONCLUSION

For the reasons stated above, in Hecla's Petition and in the Brief of Amici Curiae, Hecla's Petition For Writ of Certiorari should be granted.

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